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SUPREME COURT OF [redacted]

OCTOBER [redacted]

No. [redacted]

HOWARD M. [redacted]

vs.

THE WESTERN [redacted]

IN ERROR TO THE SUPREME COURT OF [redacted]

[redacted]

# RECORD, CASE No. 15,006.

## SUPREME COURT OF THE UNITED STATES.

### OCTOBER TERM, 1892.

TERM No., 1042.

HOWARD M. HAMBLIN, PLAINTIFF IN ERROR,

*vs.*

THE WESTERN LAND COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

INDEX.


| | Original. | Print. |
|---|---|---|
| Caption | a | 1 |
| Abstract of the record | 1 | 1 |
| Petition | 1 | 1 |
| Abstract of title | 2 | 1 |
| Answer | 5 | 3 |
| Amendment to answer | 5 | 4 |
| Abstract of title | 13 | 9 |
| Reply | 13 | 9 |
| Amended reply | 15 | 11 |
| Amendment to petition | 19 | 13 |
| Evidence offered for plaintiff | 20 | 14 |
| Exhibit X—Stipulation as to continuance, &c. | 20 | 14 |
| Act of Congress, May 12, 1864 | 20 | 14 |
| Act of Eleventh General Assembly of Iowa, April 20, 1866 | 20 | 14 |
| Act of Twelfth General Assembly of Iowa, March 24, 1868 | 20 | 14 |
| Act of Twelfth General Assembly of Iowa, Feb'y 27, 1868 | 21 | 14 |
| Act of Twelfth General Assembly of Iowa, March 31, 1868 | 21 | 15 |
| Act of Sixteenth General Assembly of Iowa, March 15, 1876 | 21 | 15 |


JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 2, 1892.

| | Original. | Print. |
|---|---|---|
| Exhibit B—Certified copy of map of definite location of McG. & S. C. R. R. | 21 | 15 |
| Certificate to map | 22 | 15 |
| B²—Letter from secretary of state of Iowa to Commissioner General Land Office, Aug. 27, 1869 | 22 | 16 |
| Letter from Commissioner General Land Office to secretary of state of Iowa, Sept. 7, 1869 | 23 | 16 |
| C—Certified copy of map of C., M. & St. P. R'y | 23 | 16 |
| Certificate to map | 23 | 16 |
| D—Letter from Russell Sage, president, to Commissioner General Land Office, March 18, 1869 | 25 | 17 |
| D²—Letter from Secretary of Interior to Commissioner General Land Office, May 10, 1869 | 25 | 18 |
| D³—Letter from Commissioner General Land Office to governor of Iowa, May 13, 1868 | 26 | 18 |
| D⁴—Letter from Commissioner General Land Office to chief engineer McG. & Sioux City R'y, November 3, 1868 | 27 | 19 |
| D⁵—Letter from Secretary of Interior to Commissioner General Land Office, April 9, 1880 | 28 | 20 |
| E—Letter from Commissioner General Land Office to chief engineer McG. & Sioux City R'y, October 22, 1868 | 32 | 23 |
| F—Certificate of governor of Iowa to Secretary of Interior, November 10, 1878 | 33 | 23 |
| G—Certificate of governor of Iowa to Secretary of Interior, December 5, 1870 | 34 | 25 |
| H—Patent from the United States to the State of Iowa, June 17, 1873 | 37 | 27 |
| I—Decree of C. C. U. S. for the southern district of Iowa on mandate from Supreme Court U. S. in case C., M. & St. P. R. R. Co. *vs.* S. C. & St. P. R. R. Co. *et al.* | 40 | 29 |
| K—Letter from Commissioner General Land Office to register and receiver at Fort Dodge, Iowa, September 12, 1864 | 48 | 35 |
| L—Letter from Commissioner General Land Office to register and receiver at Sioux City, Iowa, February 4, 1869 | 49 | 36 |
| Same to same, March 15, 1870 | 50 | 36 |
| Same to same, May 11, 1870 | 51 | 37 |
| M—Patent from State of Iowa to C., M. & St. P. R. R. Co., September 27, 1886 | 52 | 37 |
| N—Deed from C., M. & St. P. R. R. Co. to the Western Land Co., May 26, 1886 | 55 | 40 |
| Evidence offered for defendant | 56 | 40 |
| Exhibit One—Letter from General Bingham to quartermaster general, January 20, 1870 | 60 | 43 |
| Letter from General Bingham to attorney general of Iowa, January 22, 1870 | 61 | 44 |
| Letter from attorney general of Iowa to General Bingham, March 16, 1870 | 61 | 44 |

| | Original. | Print. |
|---|---|---|
| Exhibit One—Letter from Commissioner General Land Office to quartermaster general, April 1, 1870 | 62 | 44 |
| Letter from general attorney M. & St. P. R'y to general passenger agent, April 20, 1870 | 62 | 45 |
| Letter from General Holabird to quartermaster general, April 23, 1870 | 64 | 46 |
| Letter from Commissioner General Land Office to quartermaster general, June 13, 1870 | 65 | 47 |
| Letter from quartermaster general to Secretary of War, July 7, 1870 | 65 | 47 |
| Letter from Secretary of War to Attorney General, July 12, 1870 | 68 | 49 |
| Letter from acting quartermaster general to Commissioner General Land Office, February 6, 1868 | 68 | 49 |
| Letter from Commissioner General Land Office to acting quartermaster general, February 15, 1868 | 69 | 50 |
| Letter from general attorney M. & St. P. R'y to A. V. H. Carpenter, December 28, 1869 | 70 | 50 |
| Letter from acting quartermaster general to General Bingham, February 2, 1870 | 71 | 51 |
| Letter from general ticket agent to General Bingham, February 26, 1870 | 72 | 52 |
| Letter from auditor to Samuel Stevenson, February 24, 1870 | 72 | 52 |
| Letter from General Bingham to quartermaster general, March 1, 1870 | 73 | 52 |
| Letter from secretary of state of Iowa to General Bingham, March 25, 1870 | 73 | 53 |
| Letter from quartermaster general to Secretary of War, November 14, 1870 | 74 | 53 |
| Letter from Secretary of War to Attorney General, November 18, 1870 | 74 | 53 |
| Letter from General Holabird to Colonel Rucker, May 9, 1871 | 74 | 53 |
| Letter from Colonel Rucker to quartermaster general, —— —, —— | 75 | 54 |
| Letter from quartermaster general to Secretary of War, May 15, 1871 | 76 | 55 |
| Letter from O. E. Britt to R. H. Magee, June —, 1871 | 76 | 55 |
| Letter from General Holabird to quartermaster general, June 19, 1871 | 77 | 55 |
| Letter from acting Attorney General to Secretary of War, June 19, 1871 | 77 | 56 |
| Proceedings of directors of McGregor Western R'y Co. | 83 | 59 |
| Act granting lands to McG. & S. C. R'y Co. | 84 | 60 |
| Exhibit Two—Map of line of construction of C., M. & St. P. R'y through O'Brien county and certificate thereto | 89 | 63 |

| | Original. | Print. |
|---|---|---|
| Exhibit Three—Map of definite location of McG. & W. R'y in O'Brien Co. and certificate thereto | 90 | 65 |
| Testimony of F. N. Derby | 90 | 65 |
| Warren Walker | 92 | 66 |
| Exhibit Four—Diagram showing limits ordered withdrawn and certificate thereto | 96 | 69 |
| Testimony of Joseph Manley | 96 | 69 |
| Howard M. Hamblin | 98 | 71 |
| Pleadings in case of C., M. & St. P. R'y Co. *vs.* S. C. & St. P. R. R. Co. *et al.* | 102 | 73 |
| Bill of complaint | 103 | 74 |
| Answer of Gear and Powers | 116 | 84 |
| Answer of S. C. & St. P. R. R. Co. *et al.* | 117 | 84 |
| Evidence offered for plaintiff in rebuttal | 135 | 97 |
| Exhibit O—Map (not set out) | 135 | 97 |
| Judgment | 136 | 97 |
| Notice of appeal | 137 | 98 |
| Assignments of error | 137 | 98 |
| Appellee's additional abstract | 143 | 99 |
| Note by clerk as to identification of certain maps | 150 | 102 |
| Submission | 150 | 102 |
| Opinion | 152 | 103 |
| Judgment | 164 | 108 |
| Petition for writ of error | 166 | 108 |
| Writ of error | 167 | 109 |
| Bond | 168 | 110 |
| Citation and service | 169 | 111 |
| Assignment of errors | 170 | 112 |
| Clerk's certificate | 171 | 112 |

a Pleas before the supreme court of the State of Iowa.

Be it remembered that on the 13th day of April the pl'ff in error (who was def't in the court below) filed in the office of the clerk of the supreme court of Iowa a printed abstract of the record, said abstract being in the words and figures following, to wit:

1 (Endorsed:) "Due, legal, & personal service of the within abstract acknowledged this 11 day of April, 1889. Monk & Barrett & Callvert, att'ys for appellees."

In Supreme Court of Iowa, May Term, 1889.

THE WESTERN LAND COMPANY, Appellee,
*vs.*
HOWARD M. HAMBLIN, Appellant.

Appeal from O'Brien district court. Hon. Scott M. Ladd, judge.

John S. Monk and Barrett & Calvert, attorneys for appellee.
D. D. McCallum and Joy, Hudson & Joy, attorneys for appellant.

On the 24th day of August, 1887, the plaintiff, in the O'Brien district court, filed its petition stating its cause of action as follows:

The plaintiff states:

That it is a corporation organized and doing business under and in pursuance of the laws of Iowa; that it is entitled to the immediate possession of the following-described real property, situated in said county, to wit: The northeast quarter of section number one (1), in township number ninety-five (95,) north range number forty-one (41) west, 5th P. M.

2

That the plaintiff is the absolute owner in fee simple of said real property; that the defendant unlawfully keeps plaintiff out of possession of said property; that plaintiff has sustained damages by reason of the wrongful withholding of the same by defendant, in the loss of the rents and profits thereof, in the sum of five hundred dollars; wherefore plaintiff demands judgment for the immediate possession of said property, and for five hundred dollars' damages and costs.

JOHN S. MONK,
*Attorney for Plaintiff.*

*Amended Arstract, to be Attached to Petition in said Cause.*

The following is a correct abstract of the title relied on by plaintiff in this action:

1. Act of Congress entitled: "An act for a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of a railroad in said State." Approved May 12, 1864.

2. An act of the General Assembly of the State of Iowa, approved April 20, 1866, entitled: "An act to accept the grant of land to the

State of Iowa made by act of Congress of May 12, 1864, and to carry out the provisions of said act, entitled: 'An act for a grant of land to the State of Iowa, in alternate sections, to aid in the construction of a railroad in said State."

3. An act of the General Assembly of the State of Iowa, approved March 24, 1868, entitled: "An act to amend an act approved April 20, 1866, entitled: 'An act to accept the grant of land to the State of Iowa,' made by an act of Congress of May 12, 1864, and to carry out the provisions of said act, entitled: 'An act for a grant of land to the State of Iowa, in alternate sections, to aid in the construction of a railroad in said State, and to make effectual the acceptance by the State of Iowa of said land grant."

4. An act of the General Assembly of the State of Iowa, ap-
3 proved February 27, 1868, entitled: "An act to resume all the lands and rights conferred upon the McGregor Western Railway Company, by or under an act of Congress, approved May 12, A. D. 1864."

5. An act of the General Assembly of the State of Iowa, approved March 31, 1868, entitled: "An act making a grant of land to the McGregor and Sioux City Railway Company, or, in case of their failure to accept the same, to the Forty-third Parallel Company, and to execute the trust conferred by act of Congress, entitled: An act for a grant of land to the State of Iowa, in alternate sections, to aid in the construction of a railroad in said State, approved May 12, 1864."

6. An act of the General Assembly of the State of Iowa, approved March 15, 1876, entitled: "An act relating to the lands heretofore granted to the McGregor and Missouri River Railroad Company, resuming said lands and regranting the same upon new conditions to the said company, and providing for forfeiture thereof, and in case of such forfeiture, for the disposition to be made of said lands."

7. An act of the General Assembly of the State of Iowa, approved February 27, 1878, entitled: "An act in relation to the lands granted to the State of Iowa, by act of Congress, entitled: 'An act for a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of a railroad in said State,' approved May 12, 1864, and to grant to and impose upon the Chicago, Milwaukee and St. Paul Railway Company the powers and liabilities mentioned in chapter four (4), title ten (10), of the Code."

8. Duly certified copy of map of location of route filed by the McGregor and Western Railroad Company, August 30, 1864, in the General Land Office at Washington, D. C.

9. Duly certified copies of maps of location of route, filed by the McGregor and Sioux City Railroad Company in the General Land Office at Washington, D. C., and certified by the governor of Iowa, under dates of January 21 and August 27, 1869, respectively. Also letter of Iowa's secretary of state of August 27, 1869, transmitting map to Department of Interior.

10. The following letters from the Commissioner of the General Land Office, one bearing date May 13, 1868, to the governor
4 of Iowa; two to D. C. Shepard, dated October 22, 1868, and

November 3, 1868, respectively; letter from Russell Sage to Secretary of Interior, bearing date March 8, 1869, and in reply of the Secretary thereto; also copy of certificates of governors of Iowa to completion by the Chicago, Milwaukee and St. Paul railway and its predecessors of the line of railroad, aided by said grants from McGregor westward to point of intersection with Sioux City and St. Paul railroad.

11. Patents from the United States to the State of Iowa for lands in controversy in this suit, with other lands, for the benefit of the Sioux City and St. Paul Railway Company, said patents not being recorded in said county.

12. Decision by Secretary of the Interior of April 9, 1880, respecting the construction by the Chicago, Milwaukee and St. Paul Railway Company of its line of railroad.

13. Orders of withdrawal by the department of lands along said railroad from McGregor westward to point of intersection with the Sioux City and St. Paul railroad in O'Brien county, Iowa.

14. Also letters from Commissioner of General Land Office to the register and receiver, under dates of February 4, 1869, March 15, 1870, and May 11, 1870, respectively.

15. Map of conflicting limits of said roads certified by Commissioner of General Land Office.

16. Copy, duly certified, of final decree in United States circuit court, district of Iowa, rendered at May term, 1886, in a certain suit wherein the Chicago, Milwaukee and St. Paul Railway Company was complainant and the Sioux City and St. Paul Railway Company and others were defendants. A copy of which decree being filed in the recorder's office of said O'Brien county, on the 25th day of May, 1886, and recorded in book 23 of deeds, at pages 197 to 214, inclusive; also copy of mandate from the Supreme Court of the United States to said circuit court, in cause.

17. Order of United States circuit court confirming the report of Commissioners, partitioning joint indemnity and joint place lands between the Chicago, Milwaukee and St. Paul Railway Company and the Sioux City and St. Paul Railway Company, recorded in the recorder's office of said O'Brien county, in Miscellaneous Records, pages 244 to 253, inclusive.

18. Record of patent from the State of Iowa to the Chicago, Milwaukee and St. Paul Railway Company, for lands in question, with other lands; said patent being recorded in the recorder's office of O'Brien county, in Book 23 of Deeds, page 480.

19. Deed from Chicago, Milwaukee and St. Paul Railway Company of lands in question, with other lands, to the said Western Land Company, recorded in the recorder's office of O'Brien county, in Book 23, page 523.

And on the 19th day of October, 1887, the defendant filed this answer to the petition setting up the following defense:

Comes now defendant herein, and for answer to plaintiff's petition, in this cause filed, denies each and every allegation in said

petition contained, except such allegations as are hereinafter admitted.

And on the 14th day of January, 1888, the defendant filed his amendment to answer to the petition, setting up the following additional defenses:

*Amendment to Answer.*

Comes now the defendant herein and by leave of court, first obtained, files this, his amendment to his answer already filed herein:

Defendant further answering say-, that he has filed in the United States district land office, at Des Moines, Iowa, an application to enter said land, pursuant to the homestead laws of the United States, and the rules of the Commissioner of the General Land Office
6 of the United States, on the — day of ——, 1881. That prior to making said application, this defendant entered upon said land and erected valuable improvements thereon, and has resided on said land and made it his exclusive home ever since said time, and is now occupying said land pursuant to the homestead laws of the United States.

Defendant further avers that the land referred to in plaintiff's abstract of title No. 3 was a grant to the McGregor and Western Railway Company from the United States, and the Chicago, Milwaukee and St. Paul Railway Company became the grantee in this said grant, by the act of the legislature of Iowa, subject, however, to the condition subsequent, as contained in the act of Congress, approved May 12, 1864, to the lands described in plaintiff's petition, and said McGregor and Western Railway Company transferred all its right, title and interest in and to the land described in said grant to the McGregor and Sioux City Railway Company; and the said McGregor and Sioux City Railway Company transferred all its right, title and interest in and to the land described in said grant to the Chicago, Milwaukee and St. Paul Railway Company; that the said Chicago, Milwaukee and St. Paul Railway Company transferred all its right, title and interest in and to said land grant to this plaintiff, but reserved therefrom all right, title and interest that the defendant might have in the land described in the plaintiff's petition; and that the said pretended patent from the Government of the United States and patents and certificates from the State of Iowa, and the several acts of the legislature of the State of Iowa to the plaintiff's grantors, reserved all right, title and interest that this defendant might have in and to said land; that the legal and equitable title in and to said land is in this defendant, and not in the plaintiff or its grantors.

Defendant further answering states that the act of Congress entitled "An act for a grant of land to the State of Iowa in alternate sections to aid in the construction of a railroad in said State," approved May 12, 1864, referred to in item one of the pretended abstract of title attached to plaintiff's petition, granted the lands therein referred to to the State of Iowa, subject to the disposal of the

legislature of said State, for the purpose of aiding in its con-
7 struction of a railroad in said State from the foot of Main street in South McGregor, Iowa, in a westerly course as near as practicable, on the line of the 43d parallel, to the intersection of said line on the 43d parallel with the Sioux City and St. Paul Railroad Company in O'Brien county, Iowa. And it was also provided in said act of Congress that if the railroad accepting said grant should not be completed within ten years from its acceptance thereof, the said land thereby granted and not patented to said company, should revert to the State of Iowa, for the purpose of securing the completion of said road within five years thereafter. And that if the said State should fail, to complete said road within five years after the ten years aforesaid, then the said land undisposed of as aforesaid should revert to the United States; that neither the United States nor the State of Iowa has ever patented the lands in controversy herein, to said Chicago, Milwaukee and St. Paul Railway Company, and more than twenty years have elapsed since the approval of the aforesaid act of Congress of May 12, 1864; that said company has failed and refused to construct and complete the said railroad from the foot of Main street, South McGregor, Iowa, to the said point of its intersection with the line of the Sioux City and St. Paul Railway Company, and in the manner required, and within the time required, by the aforesaid act, and still fails and refuses so to do.

That said Chicago, Milwaukee and St. Paul Railway Company, nor any of its grantors did not construct twenty miles of road during the years 1869, 1870, 1871, 1872, 1873, 1874, 1875, 1876 and 1877, and has thereby forfeited all its right, title and interest in and to the lands embraced in the act of Congress of May 12, 1864. That the act of the legislature of the State of Iowa, approved March 31, 1868, entitled An act making a grant of land to the McGregor and Sioux City Railway Company, or in case of their failure to accept the same, to the Forty-third Parallel Company, and to execute the trust conferred by the act of Congress entitled An act for a grant of land to the State of Iowa, in alternate sections, to aid in the construction of a railroad in said State approved, May 12, 1864, is in violation of the terms of said grant, and is unconstitutional and void,

and is contrary to the terms and conditions subsequent as
8 provided by said act of May 12, 1864. That the act of the General Assembly of the State of Iowa, approved March 15, 1876, entitled An act, relating to the land heretofore granted to the McGregor and Missouri River Railroad Company, resuming said lands and regranting the same upon new conditions to the said company, and providing for forfeiture thereof, and in case of such forfeiture for the disposition to be made of said lands, is unconstitutional, and in violation of the condition subsequent, of the act of May 12, 1864, and is absolutely void.

That the act of the General Assembly of the State of Iowa, approved February 27, 1878, entitled An act in relation to the lands granted to the State of Iowa, by the act of Congress approved May 12, 1864, and to grant, and to impose upon the Chicago, Milwaukee and St. Paul Railway Company, the powers and liabilities mentioned

in chapter 4, title 10 of the Code of Iowa, of 1873, is unconstitutional, and in violation of the conditions subsequent, mentioned in the act of Congress of May 12, 1864, and is absolutely void.

That all the acts of the General Assembly of the State of Iowa, and all the acts of the different governors of Iowa, and all the acts of the different registers of the State land office of the State of Iowa, and all the acts of the Secretary of the Interior of the United States, and all the acts of the Commissioner of the General Land Office of the United States, and all the acts of the different Presidents of the United States, in attempting to convey title from the Government of the United States, or from the State of Iowa, to any and all of this plaintiff's grantors, is in violation of the conditions subsequent of said act of Congress, approved May 12, 1864, and is in violation of the Constitution of the United States and the State of Iowa, and is absolutely void.

Defendant further answering, states, that in the aforesaid act of Congress, approved May 12, 1864, it was provided, that the railroad company accepting said grant, and constructing the road from Main street *of* South McGregor, Iowa, to a point intersecting the line of road of the Sioux City and St. Paul Railway Company, in O'Brien county, Iowa, should not be entitled to any lands in said
9 grant included, until the governor of the State of Iowa should certify to the Secretary of the Interior, at Washington, D. C., that a section or sections of ten consecutive miles were completed in a good and substantial, workmanlike manner, as a first-class road. That the Chicago, Milwaukee and St. Paul Railway Company, and its predecessors, companies, heretofore mentioned, did not construct nor complete a first-class road over any of the different sections of ten consecutive miles, as a land-grant road, between Main street in South McGregor, Iowa, to Calmar, Iowa, a distance of fifty-two miles. That said road pretended to have been constructed, pursuant to the terms and conditions subsequent of said act of May 12, 1864, is not a land-grant road in any particular, is not subjected to any of the conditions of a land-grant road, pursuant to said act, does not, nor is it compelled to transport troops and supplies of the United States Government free of charge pursuant to the conditions subsequent of said grant of May 12, 1864.

That the said Chicago, Milwaukee and St. Paul Railway Company has never been completed, nor attempted to complete but twenty-one of the aforesaid sections of ten consecutive miles of said road, which said sections commence at Calmar, Iowa, and run thence in a westerly direction, two hundred and ten miles, toward the town of Sheldon, Iowa, and no other or further sections have ever been legally certified, nor has any ever been legally certified to said company by the governor of Iowa, as required by said act, nor to the Secretary of the Interior of the United States.

That the odd-numbered sections embraced within the place or ten-mile limits, on each side of the aforesaid two hundred and ten miles of railroad, pretended to be so constructed, contained in all, only twenty-one hundred sections of land.

That if said company ever became entitled to any land by reason

of the construction of the aforesaid two hundred and ten miles of the said road, it thereby earned not to exceed the said twenty-one hundred sections, less one-half of the sections of land included in what is commonly known as the overlapping or common ten-mile limits of the said company and the Sioux City and St. Paul
10 Railway Company, caused by the intersection of said road at Sheldon, in O'Brien county, Iowa, north of the forty-third parallel of latitude, to wit: (2050 see Mac) sections in all. That the said Chicago, Milwaukee and St. Paul Railway Company has already received patents and certificates erroneously and fraudulently issued from the State of Iowa to more sections of land than it is entitled to pursuant to said grant of May 12, 1864, which certificates and patents do not embrace the land in controversy herein, and said company, nor this plaintiff is not therefor- entitled thereto.

That it was provided in the act of the General Assembly of the State of Iowa, approved April 3, 1866, that said company should locate and definitely fix the line of route, as soon as practicable after the passage of said act, and should file a map showing such line of route, in the office of the governor of the State of Iowa, and that said governor after affixing his official signature thereto, should cause such map to be filed in the office of the Secretary of the Interior, and thereupon the location of such line of route should be considered final, so far as to fix the limit and boundary within which lands may be selected under and by virtue of said act of Congress, approved May 12, 1864. And it was further provided in said act that the said company accepting said grant, should be required so to do by a written instrument, under the seal of such corporation and signed by its president and secretary, and should file the same in the office of the secretary of state of Iowa within six months thereafter, and that said company so accepting said grant should take the same with the conditions imposed and terms provided by said act.

That on the 30th day of August, 1864, the McGregor and Western Railway Company duly accepted said grant, in writing, in the General Land Office of the United States, and that said acceptance was received and filed in the said General Land Office on the 30th day of August, 1864, subject to all the conditions subsequent of said act of May 12, 1864.

That said acceptance was filed in the office of the governor of the State of Iowa on the 10th day of August, 1864; and with said acceptance, a map showing the definitely located line of route of
11 said road, and the ten and twenty mile limits were as thereby definitely determined, and caused the official signature of said Governor to be thereto affixed, and said map to be filed in the office of the Secretary of the Interior of the United States, as provided by said act of Congress of May 12, 1864. That the land in plaintiff's petition described is not included within the ten-mile limits of said road as definitely located and fixed by the aforesaid map. That the said Chicago, Milwaukee and St. Paul Railroad Company having already received more land within the place and indemnity limits of said road than it was possible to earn, by reasons

of the construction of said two hundred and ten miles of said road as aforesaid, this plaintiff had no right, title or interest in and to the lands in controversy. That neither this defendant nor the State of Iowa, nor the United States were ever made parties to the action in which the decree was rendered in the United States circuit court of the State of Iowa, at the May term, 1886, referred to in item 15 of the pretended abstract of title attached to plaintiff's petition, and no relief is therein asked by said Chicago, Milwaukee and St. Paul Railway Company against the State of Iowa, John H. Gear, as governor, or James K. Powers, as register of the State land office of the State of Iowa, and no relief was therein asked by said company against the United States nor against the President of the United States, nor against the Secretary of the Interior, nor against the Commissioner of the General Land Office; and said decree neither operates to convey any title to plaintiff, nor neither do the several acts of the legislature as aforesaid, nor the letters from the Commissioner of the General Land Office, nor the letters from Russell Sage to the Secretary of the Interior, nor the letters of the Governor of Iowa, nor the letters from the Commissioner of the General Land Office to D. C. Shepard, operate to convey any title to plaintiff, nor constitute a link in the plaintiff's chain of title, as shown by its abstract.

Defendant further answering plaintiff's petition avers that prior to the commencement of this action, and without enumerating the lands in controversy herein, the plaintiff's grantors had received more land, and the Chicago, Milwaukee and St. Paul Rail-
12 way Company had received more land than it has earned by constructing its line of railroad from Calmar, Iowa, to Sheldon, O'Brien county, Iowa, under and by virtue of the act of Congress, and the several acts of the General Assembly of the State of Iowa, referred to in its abstract of title attached to its petition herein; and the defendant avers that the patent from the United States to the State of Iowa, referred to in the abstract of title attached to plaintiff's petition, was wrongfully, unlawfully and mistakenly issued by the United States to the State of Iowa for the land in controversy herein, for the use and benefit of the Chicago, Milwaukee and St. Paul Railroad Company.

The defendant admits that the decree referred to in the plaintiff's abstract of title attached to his petition, was made as therein stated, and that the land in controversy was mentioned in said decree, but plaintiff avers that neither the defendant herein, nor the United States, nor the President thereof, nor the Secretary of the Interior, nor the Commissioner of the General Land Office, nor the State of Iowa, nor the governor thereof, nor James K. Powers, the register of the State land office of Iowa, was made a party to the suit in which said decree was entered.

Defendant further avers that no relief was demanded in said suit by the Chicago, Milwaukee and St. Paul Railroad Company, as against the United States, or the President thereof, or the Secretary of the Interior, or the Commissioner of the General Land Office, or the State of Iowa, or the governor thereof, or the register of the

State land office, or the defendant herein. And if said decree shall be admitted in evidence upon the trial in this cause, this defendant, for further certainty, begs leave to refer to the several pleas made by the parties to said suit, and the issues joined and made therein, and he requests the said decree may be read and construed in connection with the several issues and pleas made and joined in said action.

Defendant also admits that he is in possession of said land described in plaintiff's petition, and that he is in possession of the same pursuant to the homestead laws of the United States and the directions of the Commissioner of the General Land Office, in an official letter, dated on the — day of ——, 1884, and also under
13 the directions and instructions of the Hon. I. S. Struble, member of Congress from the eleventh congressional district of Iowa, and also by the authority given orally by the Commissioner of the General Land Office, and also by authority of being a man, of lawful age, and coming well recommended, and a citizen of the United States; and also by having made the said land his exclusive home for the last five years.

Wherefore, defendant asks that the patent or pretended patent issued by the Government of the United States to this plaintiff's grantors be reformed and made to convey title to this defendant, and that this defendant have the writ of injunction restraining this plaintiff from interfering with the right, title or interest, or from interfering with the possession of this defendant of said land, and that the defendant have judgment against the plaintiff for the costs of this suit, and for such other and further relief as may be just and equitable in the premises.

ARGO & McDUFFIE, AND
D. D. McCALLUM,
*Attorneys for Defendant.*

*Abstract of Title of Defendant.*

To this answer the defendant attaches an abstract, showing his claim and right to the land in suit to be under the homestead laws of the United States, his application to enter the same under said act, and his settlement and acceptance of the said land under said act, and the letter of the Commissioner of the General Land Office authorizing him so to do.

And on the 14th day of January, 1888, the plaintiff filed its reply to the answer and amended answer, setting up the following defense, to wit:

Par. 1. Now comes the plaintiff, and in reply to the answer and counter-claim filed herein by defendant, avers: That by an act of Congress approved May 12, 1864, the lands in question were granted to the State of Iowa to aid in the construction of certain lines of railroad as stated in said act, which grant was duly accepted
14 by the State of Iowa and the lands embraced therein conferred upon the McGregor Western Railroad Co.; that said

grant was by the legislature of Iowa resumed from the McGregor Western Railroad Co. and conferred upon the McGregor and Sioux City Railroad Co., resumed from the McGregor and Missouri River Railroad Co., formerly the McGregor and Sioux City Railroad Co., and regranted to the last-mentioned company upon new conditions and afterwards resumed from said McGregor and Missouri River Railroad Co. and conferred upon the Chicago, Milwaukee and St. Paul Railroad Co., which last-mentioned railroad company plaintiff avers, having duly accepted said grant, completed the line of said railroad in aid of which said lands were granted and complied fully with all the conditions of said granting acts, State and national, as shown by the certificates of the governor of Iowa attached to plaintiff's abstract of title herein, and received from the State of Iowa a patent for said lands which patent is referred to in abstract of title attached to plaintiff's petition.

Par. 2. Plaintiff further avers that a patent for said lands was issued by the United States to the State of Iowa for the benefit of the Sioux City and St. Paul Railroad Co. as stated in the abstract attached to plaintiff's petition; and that by virtue of a decree the United States circuit court in and for the district of Iowa, in an action wherein The Chicago, Milwaukee and St. Paul Railroad Co. were complainants and The Sioux City and St. Paul Railroad Co., and all other persons interested in the subject-matter of said suit were parties, it was decreed, among other things, that the said Chicago, Milwaukee and St. Paul Railroad Co. were the equitable owners of the lands in dispute and the title to said lands was by said decree quieted in the Chicago, Milwaukee and St. Paul Railroad Co. from whom plaintiff herein derives title by and through a warranty deed specified in the abstract attached to plaintiff's petition.

Par. 3. Plaintiff further avers that the line and route of said road was definitely located past the lands in controversy, and maps duly authenticated and certified of said definite location were duly filed in the office of the Commissioner of the General Land Office as provided by the terms and conditions of said acts of Congress and of the legislature of Iowa in the years 1869 and 1870, which maps are referred to in the abstract of title attached to plaintiff's petition herein.

Par. 4. Plaintiff further avers that in and by virtue of the letters and orders of withdrawal specified in the abstract to plaintiff's petition the lands in controversy where in the year 1870 and prior thereto reserved for the use and purposes of said grant under said acts from sale or entry of any kind; that said reservation was made by order of the Department of the Interior long prior to the pretended entry and settlement of defendant, and that said lands have never been restored to entry or released from such reservation, and were not at the date of said defendant's pretended entry subject to sale or entry or other disposal by the Government; and plaintiff denies that any entry of any kind or nature of said lands was ever made by the defendant herein, or allowed by the department or local officers of the United States Land Office; and avers that defendant has no right, title or interest in or to the lands in controversy,

and no right to question the title of plaintiff thereto, which title plaintiff avers is absolute and indefeasable.

Par. 5. Further replying plaintiff denies each and every allegation in the answer contained not hereinbefore expressly admitted.

And on the 16th day of January, 1888, the plaintiff filed its amended reply to defendant's answer and counter-claim setting up the following defenses:

Par. 1. Comes now the plaintiff and for reply to the amended answer and counter-claim herein avers: That by act of Congress, approved May 12, 1864, the land described in plaintiff's petition was granted to the State of Iowa for the use and benefit of the McGregor and Western Railroad Company, to aid in the construction of a railroad from a point at or near the foot of Main street of South McGregor, in said State, in a westerly direction by the most practicable route, on or near the forty-third parallel of north latitude until it should intersect a railroad; also provided for by
16 said act to be constructed from Sioux City to the Minnesota State line the point of said intersection to be in O'Brien county, in said State. That by said act it, among other things, provided that if the said McGregor and Western Railroad Company or assignees should fail to complete at least twenty miles of its railroad each and every year from the date of its acceptance of the grant, provided for in said act the State might resume said grant and so dispose of the same as to secure the completion of the road on said line and upon such terms within such time as the State should determine, and if said road was not completed within ten years from such acceptance, the land granted in aid thereof as aforesaid, should revert to the State of Iowa for the purpose of securing the completion of said road within such time not to exceed five years, upon such terms as the State should determine. And the plaintiff avers that said McGregor and Western Railroad Company, and the McGregor and Missouri River Railroad Company, and the McGregor and Sioux City Railroad Company, from whom said grant was resumed by the State of Iowa as hereinafter stated, having each failed to comply with the terms and conditions of said grant. That said grant was by the legislature of the State of Iowa resumed from the McGregor and Western Railroad Company and conferred upon the McGregor and Sioux City Railroad Company, after which it was by the said legislature resumed from the McGregor and Missouri River Railroad Company, formerly the McGregor and Sioux City Railroad Company, and regranted to the said last-mentioned company. That thereafter said grant was by said legislature resumed from said McGregor and Missouri River Railroad Company, and by act of the General Assembly of the State of Iowa, approved February 27, 1878, said lands were granted to and conferred upon the Chicago, Milwaukee and St. Paul Railway Company, which last-mentioned railway company plaintiff avers having duly accepted said grant, completed the line of said railroad in aid of which said lands were granted, and complied fully with the conditions of said granting acts, State and national, and received from the State of

Iowa a patent to said lands. The said act of Congress and the several acts of the legislature of the State of Iowa resuming said lands and reporting the same as aforesaid, as well as the certificate of the governor of Iowa of the completion of said railroad, and the patent issued from the State of Iowa to the Chicago, Milwaukee and St. Paul Railway Company being duly referred to in abstract of title attached to plaintiff's petition herein.

Par. 2. Plaintiff further avers that the grant by the said act of Congress of May 12, 1864, was of every alternate section of land designated by odd numbers for ten sections in width, on each side of said road, and it was provided by said act of Congress that if it should appear when the route of said road was definitely fixed that the United States had sold any section or any part thereof granted as aforesaid, or that the right of pre-emption or homestead settlement had attached thereto, or that the same had been reserved by the United States for any purpose, that it should be the duty of the Secretary of the Interior to cause to be selected for the purpose aforesaid, from the public lands of the United States nearest to the tiers of sections above specified, within twenty miles of said road, so much, in alternate sections to such lands, as the United States has sold, reserved, or otherwise appropriated, or to which the right of homestead or pre-emption settlement had attached as aforesaid. Which lands, thus indicated by odd-numbered sections, by direction of the Secretary of the Interior, should be held by the State of Iowa for the use and purpose aforesaid.

Par. 3. Plaintiff further avers that the line, and road of said railroad, in aid of which the land described was granted in the petition of plaintiff herein, was granted by said act of Congress as aforesaid, was definitely located, passed the lands in controversy herein in the year 1869, and prior thereto the maps duly authenticated and certified of said definite location, were duly filed in the office of the Commissioner of the General Land Office, as provided by the terms and conditions of said act of Congress and of the legislature of the State of Iowa in the year 1869 and prior thereto, which maps are referred to in the said abstract of title attached to plaintiff's petition herein, and thereupon the grant of said act of Congress immediately attached to all the lands within ten sections in width on each
18 side of said railroad not sold, reserved, or otherwise appropriated, and to which the right of pre-emption or homestead settlement had not attached, including the lands described in the petition of plaintiff herein.

Par. 4. Plaintiff further avers that a patent for the land described in the petition of the plaintiff herein with other lands was issued by the United States to the State of Iowa for the benefit of the Sioux City and St. Paul Railroad Company, as stated in the abstract attached to plaintiff's petition, and that by virtue of a decree of the United States circuit court in and for the district of Iowa, at the May term, 1886, of said court, at Des Moines, Iowa, in an action wherein the Chicago, Milwaukee and St. Paul Railroad Company were complainants and the Sioux City and St. Paul Railroad Company, and all other parties interested in the subject-matter of said

suits, were defendants, it was decreed, among other things, that the land described in the petition herein, with other lands mentioned in said decree, were a part and portion of the grant made by said act of Congress, and were situated wholly within the granted limits, that is within ten miles of the definitely located line of said Chicago, Milwaukee and St. Paul Railroad Company, and not within the granted limits or within the ten miles of the definitely located line of the said Sioux City and St. Paul Railroad Company, and that the Chicago, Milwaukee and St. Paul Railway Company was entitled to the lands described in the petition of plaintiff herein, and that the State of Iowa or the proper officers of said State should, of right, make, execute and deliver to the said Chicago, Milwaukee and St. Paul Railway Company patents for the lands described in plaintiff's petition herein and other lands in said decree mentioned and described, and it was adjudged and agreed in said suit that the said Chicago, Milwaukee and St. Paul Railway Company was the owner of and entitled to the lands described in plaintiff's petition herein, and the said Chicago, Milwaukee and St. Paul Railway Company was by decree invested with the title in fee to the lands described in plaintiff's petition herein, and plaintiff's title quieted, said decree being referred to in the abstract annexed to the petition of the Western Land Company, plaintiffs herein, and that said decree
19 was duly entered prior to the issuance of the patent from the State of Iowa to the Chicago, Milwaukee and St. Paul Railway Company for the lands described in plaintiff's petition herein, which is also duly referred to in said abstract of title of said Western Land Company, plaintiffs herein.

Par. 5. Plaintiff further avers that in and by virtue of the letters and orders of withdrawal specified in the abstracts to plaintiff's petition the lands in controversy were in the year 1870 and prior thereto reserved for the use and purposes of said grant, under said act from sale or entry of any kind; that said reservation was made by order of the Department of the Interior long prior to the pretended entry and settlement of defendant, and that said lands have never been restored to entry or released from said reservation, and were not at the date of said defendant's pretended entry subject to sale or entry or other disposal by the Government, and plaintiff denies that any entry of any kind or nature of said land was ever made by the defendant herein, or allowed by the defendant or local officers of the United States Land Office, and plaintiff avers that defendant has no right, title or interest in or to the land in controversy, and no right to question the title of plaintiff thereto, such title plaintiff avers is absolute and indefeasible.

Par. 6. Further replying, plaintiff denies each and every allegation in the answer and counter-claim of the defendant contained not hereinbefore expressly admitted, and therefore demands judgment as prayed in its petition.

And on the 28th day of January, 1888, the plaintiff filed its amendment to its petition, setting up the following cause of action:

Comes now the plaintiff and by leave first had and obtained files this its amendment to its petition heretofore filed in this case.

The plaintiff asks that all claims for damages in its original petition contained be dismissed without prejudice, and that it have judgment against the defendant for possession as prayed in its original petition.

20 And on the 28th day of January, 1888, said cause was tried to the court, and on the trial the following proceedings were had:

The plaintiff to sustain the issues on its part offers in evidence the following stipulation:

PLAINTIFF'S EXHIBIT "X."

A stipulation between these parties whereby it was agreed that this case should be continued until this time and the case set down for trial on the first day of this term of court, to the court and that neither party should apply for or ask for a change of place of trial without any reference to which judge should hold this term of court, and that four other cases should be tried on the evidence submitted in the case. But there should be a separate appeal bond filed in each case in case they were appealed from, the other cases not being appealed from, said exhibit has no bearing on the merits of this case.

Plaintiff next offers in evidence act of Congress, approved May 12, 1864, entitled "An act for a grant of lands to the State of Iowa in alternate sections to aid in the construction of a road in said State," which said act is found in the Revised Statutes of the United States and in 38 United Statutes at Large.

Defendant objects to the introduction of the same for the reason it is incompetent, and it is not shown that said act has been filed in the recorder's office of O'Brien county, Iowa, as required by chapter 186 of the Laws of the General Assembly of Iowa of 1880.

Objection overruled by the court.

Defendant excepts.

Plaintiff next offers in evidence chapter 144 of the Laws of the Eleventh General Assembly of Iowa, approved April 20, 1866. (See Session Laws of 1866.)

Defendant objects to the introduction of said act as last above.

Objection overruled.

Defendant excepts.

Plaintiff next offers in evidence an act of the General Assembly of Iowa, approved March 24, 1868, entitled "An act to

21 amend an act, approved April 20, 1866, entitled 'An act to accept the grant of land to the State of Iowa made by act of Congress of May 12, 1864.'" (See chapter 42, Session Laws of 1868.)

Defendant objects to the introduction of said act for the reason last above.

Overruled by the court.

To which ruling of the court the defendant excepts.

Plaintiff next offers in evidence an act of the General Assembly of the State of Iowa, approved February 27, 1868, entitled "An act to resume all lands and rights conferred upon the McGregor and

Western Railroad Company under the act of Congress, approved May 12, 1864." (See chapter 16, Session Laws, 1868.)

To which the defendant objects as last above.

Overruled by the court.

To the ruling of the court the defendant excepts.

Plaintiff next offers in evidence chapter 58 of the Laws of the Twelfth General Assembly of Iowa. (See Session Laws of 1868.)

The defendant objects as last above.

Objection overruled.

Defendant excepts.

Plaintiff next offers in evidence chapter 96 of the Laws of the Sixteenth General Assembly of Iowa. (See Session Laws of 1876.)

The defendant objects for the reason last above and that the same is *ultra vires* and is void.

Overruled.

Defendant excepts.

Plaintiff next offers in evidence Exhibit "B."

EXHIBIT "B"

is a certified copy of the map of definite location of the McGregor and Sioux City railroad from the southwest corner of section 18, township 96, range 38, through O'Brien county, Iowa, to a connection with the Sioux City and St. Paul railroad, filed in the
22 General Land Office of the United States September 7, 1869, attached to transcript as Exhibit "B," page 98; but from its nature and extent cannot be set out in abstract, but reference to transcript is made where same is attached and the certificate thereto is as follows:

PLAINTIFF'S EXHIBIT "B," Page 98, Tr.

DECEMBER 30, 1886.

I, Wm. A. J. Sparks, Commissioner General Land Office, hereby certify that the annexed copy of the map of the proposed definite location of the McGregor and Sioux City railroad from the southwest corner of section 18, township 96, range 38, through O'Brien county, Iowa, to a connection with the Sioux City and St. Paul railroad, is a true and literal exemplification from the files of this office.

Defendant objects to Exhibit "B" for the reason it is incompetent, irrelevant, and immaterial, and purports to certify to a fact which is contrary to the rules of evidence.

Objection overruled.

Defendant excepts.

Defendant further objects for the reason it is in violation of the conditions subsequent of the act of Congress of May 12, 1864, and does not purport to be a copy of the map filed, but only a part of the same.

Objection overruled.

Defendant excepts.

Plaintiff offers in evidence the following Exhibit "B 2" in connection with Exhibit "B:"

STATE OF IOWA, OFFICE OF THE SECRETARY OF STATE,
DES MOINES, IOWA, *August* 27, 1869.

Hon. J. S. Wilson, Commissioner General Land Office, Washington, D. C.

DEAR SIR: I have the honor to herewith transmit map of the location of the line of the McGregor and Sioux City railway through the county of O'Brien, in the State of Iowa, and to inform you that a duplicate thereof has been placed on file in this office of
23 this date. You will please cause the receipt thereof to be acknowledged.

I have the honor to be very respectfully your most obedient servant,

ED. WRIGHT,
*Secretary of State of the State of Iowa.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *Sept.* 7, 1869.

Hon. Ed. Wright, secretary of the State of Iowa, Des Moines, Iowa:

SIR: I have the honor to acknowledge the receipt of your letter of 27th ult., accompanied by an authenticated map showing the definite location of the line of the McGregor and Sioux City railroad through O'Brien county, Iowa, to a point of intersection with the Sioux City and St. Paul railroad.

Very respectfully your obedient servant,

JOS. S. WILSON,
*Commissioner.*

Defendant objects as irrelevant, immaterial and incompetent.

Objection sustained.

Plaintiff excepts.

Plaintiff next offers in evidence a copy of a map, certified by Commissioner of the General Land Office, under date of December 30, 1886, and has the same marked Plaintiff's Exhibit "C," which, from its nature, cannot be abstracted but is attached to transcript (see page 99 of Transcript) and the certificate thereto is as follows:

*Certificate Attached to Plaintiff's Exhibit "C."*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Dec.* 30, 1886.

I, Wm. A. J. Sparks, Commissioner of the General Land Office, do hereby certify that the annexed diagram of so much of the map of the Chicago, Milwaukee and St. Paul railway filed in this office

August 30, 1864, as shows said route in connection with the
24 public surveys, and of the certificate attached thereto dated August 19, 1864, are true and literal exemplifications from the files of this office.

In testimony whereof I have hereunto subscribed my hand, and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL]

WM. A. J. SPARKS.

McGREGOR WESTERN RAILWAY,
McGREGOR, *Aug.* 19th, 1864.

We hereby certify that the line on the map, to which this is attached, designated by a black line from McGregor, in Clayton county, Iowa, to Calmar, in Winneshiek county, Iowa, and by a red line from Calmar through the counties of Chickasaw, Floyd, Cerro Gordo, Hancock, Kossuth, Palo Alto, Clay, O'Brien, in said State, to be a correct representation of the line of the McGregor Western railway, and that said railway company hereby request that the lands within twenty miles on either side of said line be reserved from sale under the provisions of the land grant made by Congress of the United States to said company.

In witness whereof the said McGregor Western Railway Company has caused its corporate seal to be hereto attached, and the signatures of the chief engineer, president, and secretary to be hereto subscribed on the day and year aforesaid.

S. CONNOVER, *Chief Engineer.*
[SEAL.] GEORGE GREENE, *President.*

H. B. WHITEHOUSE.

Plaintiff next offered in evidence letters certified under date of December 30, 1886, by the Commissioner of the General Land Office, and marked the same Plaintiff's Exhibit "D," Russel Sage to Commissioner of the General Land Office under date of March 18, 1869, which is as follows:

25 PLAINTIFF'S EXHIBIT "D."

McGregor and Sioux City railway, 25 William street.

Russell Sage, president. John Lawler, vice-president.
A. D. Cowdry, treasurer.

NEW YORK, *March* 18, 1869.

Hon. John Wilson, Commissioner of General Land Office, Washington, D. C.

SIR: The McGregor and Sioux City Railway Company, the successor of the McGregor Western Railway Co., beg leave to withdraw their maps of definite location of railroad heretofore filed by the last-named company and by themselves, and to relocate their line of

road from the last line of range 27, westerly to the intersection of the Sioux City and St. Paul railroad.

This becomes necessary for them to do because the Sioux City and St. Paul railroad have changed their definite location, carrying it northwesterly nearly four townships, which makes it necessary to change the point of intersection to a point much further north, and this cannot be done without making a bad crook in the McGregor and Sioux City railway, or changing the location as reqested.

Mr. Cowdrey, one of our directors, and treasurer, will call upon you personally, and is fully authorized to represent this company in this matter.

Respectfully yours, RUSSELL SAGE, *Pres.*

Also a letter from J. D. Cox, Secretary of Interior, to the Commissioner of the General Land Office under date May 10, 1869, marked "D" (2), which is as follows:

PLAINTIFF'S EXHIBIT "D" (2).

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *May* 10, 1869.

SIR: I have received your letter of the 30th March last
26 submitting the application of the McGregor and Sioux City Railroad Company of Iowa, to change the location of their road west of range twenty-seven.

After a road has been definitely located, the map thereof filed here and accepted and the lands withdrawn no specific authority is given whereby this department can accept another location, and in the absence of such authority I must decline to give my approval to the map presented.

I return the map and papers herewith.

Very respectfully your obedient servant,

J. D. COX, *Secretary.*

Hon. Jas. S. Wilson, Commissioner of the General Land Office.

Also the following letter from Joseph D. Wilson, Commissioner of the General Land Office, to the governor of Iowa under date May 13, 1868, marked Plaintiff's Exhibit "D" (3):

PLAINTIFF'S EXHIBIT "D" (3.)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *May* 13, 1868.

His excellency, Samuel Merrill, governor of Iowa:

SIR: The act of Congress approved May 12, 1864, Statutes vol. 13, p. 72, making a grant of lands to the State of Iowa in alternate sections, to aid in the construction of a railroad in said State. Pursuant to said act the McGregor and Western Railroad Company filed a map which designated the line of road frrm McGregor to section 19,

of township 95, range 40, O'Brien county, Iowa, the point of intersection with the then proposed line of the Sioux City and St. Paul railroad running northwesterly from Sioux City to the Minnesota State line.

In view of adjusting the grant separately it was described to have the true point of intersection in O'Brien county in accordance with the statute, and for that purpose I have the honor to request you to cause the McGregor and Western Railroad Company at an early day to file a map properly authenticated, showing the true
27 location of said line through Clay and O'Brien counties to point of intersection with the Sioux City and St. Paul railroad.

With great respect your obedient servant,

JAS. S. WILSON,
*Commissioner.*

Also the following letter from the Commissioner of the General Land Office to D. C. Shepard, chief engineer of the McGregor and Sioux City Railroad Company, marked Plaintiff's Exhibit "D" (4):

PLAINTIFF'S EXHIBIT "D" (4.)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *Nov.* 3, 1868.

D. C. Shepard, Esq., chief engineer McGregor and Sioux City railway, Minneapolis, Minn.

SIR: I am in receipt of your letter of the 27th ultimo asking further instructions as to the point of intersection of the McGregor Western railroad with the Sioux City and St. Paul railroad in Iowa. In answer I have to state the act of May 12, 1864, expressly states that the McGregor Western railroad "shall intersect the road running from Sioux City to the Minnesota State line in the county of O'Brien, which according to the located line of the last-named road, the point of intersection will be at the northwest corner of O'Brien county.

In regard to your proposition to delay the survey until spring, I have to request and insist that the work be commenced immediately in order that this office may determine by sectionized limits the lands to be held at $2.50 per acre within ten miles on each side of the located line running through Clay and O'Brien counties to the point of intersection.

Respectfully your obedient servant,

JAS. S. WILSON,
*Commissioner.*

Also a decision of Secretary Carl Shurtz under date of April 9, 1869, marked Plaintiff's Exhibit "D" (5). (See page 100 of Transcript.)

28 PLAINTIFF'S EXHIBIT "D," (5.)

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *April 9th*, 1880.

SIR: By your letter of December 19, 1879, attention was directed to the fact that the constructed road of the Chicago, Milwaukee and St. Paul Railway Company, from Algona westward to Sheldon, in the State of Iowa, was not built upon the line of definite location filed in this department in 1869, under the grant of May 12, 1864, made to the State of Iowa in favor of the McGregor Western Railroad Company. (Stats. 13, p. 72.) On the 19th of January you made further report, stating additional facts relative to the subject-matter. These reports were laid before the honorable Attorney General of the United States by my letters of the 7th and 20th of January last, with a request for an opinion upon two points necessary to be determined before taking further action in pursuance of my decision of August 18, 1879, touching the rights of the respective companies and of the State of Iowa under said grant. The inquiries presented were in substance as follows:

First, Whether or not the change of location, by the construction of the road upon a different line, had the effect to float the grant to the new line, and to require an adjustment within newly ascertained limits?

Second, If not, is the department justified in treating the construction upon the finally adopted line as a substantial compliance with the terms of the granting act, and issuing patents to the State for the lands along the line of original location?

After full consideration the Attorney General rendered his opinion on the 2d of February last, a copy of which I herewith enclose for your files.

He holds that the effect of the original location, "when made, was to give precision to the grant to the State and to define the limits within which the lands granted could be at once ascertained by the public surveys. That the grant lost its character of a float by the definite location," and it must be adjusted accordingly.

Upon the second point his opinion is to the effect that an unauthorized or unwarranted departure in construction from the
29 definitely located line, would destroy the identity of the road and render it impossible to recognize any right based upon such unwarranted construction to patents for the granted lands; that slight deviations, if required by engineering necessities to obviate great practical difficulties and avoid exaggerated expense, or to remedy defects in the original location, ought not to be considered sufficiently material to prevent a recognition of the road if constructed substantially in compliance with law, but that in judging of such matters the Secretary of the Interior must exercise his own discretion, no certain and fixed limit being possible, and each case must necessarily rest upon its own merits, as presented for final adjudication to this department.

Concurring in these views of the law, it becomes my duty to con-

sider the case in hand and determine whether or not the deviations from the original line should have the effect to defeat the issue of patents.

I am in receipt, by letter of the 2d inst., from John W. Corey, Esq., general solicitor of the company, of two affidavits, made, respectively, one by D. C. Shepard, who, as chief engineer of the McGregor and Sioux City Railroad Company, made the original definite location in 1868, and also located the line of construction road; the other, by Dan. J. Whittemore, chief engineer of the Chicago, Milwaukee and St. Paul Railway Company, who, as such officer, adopted and approved the line of said location, only changing the same to a very slight extent at two specified points.

These affidavits explain the particular reasons for the adoption of a line of construction, deflecting at various points from the definite location and are to the effect: That the line surveyed in 1868, upon an imperative demand of your office for the immediate filing of the map, was hastily run in the winter season, for the purposes of effecting a connecting with the Sioux City and St. Paul railroad, the line of which had been carried several miles to the north and west of the route originally supposed to have been fixed by that company; that in the haste, and with the ground covered with snow, it was impossible to select the best and most practicable route, but that the locating was intended to give the general lines, subject to such immaterial changes as might be found necessary in the construction of the road; that the surveying party failed to understand and follow the direction given by the chief engineer and made a mistake in locating a portion of the line, so that a subsequent correction became necessary to secure a proper connection into the Sioux City and St. Paul road; that the crossing of the East fork of the Des Moines river has been made at the only feasible point within four or five miles on either side north or south; that the line is deflected south from such crossing to avoid a high hill, and at a point ten miles west from Algona bears still further south to avoid a long, elevated ridge extending several miles to the northward, and from that point westward to Sheldon, runs on the most direct practicable and feasible route; that for the whole distance from Algona to Sheldon the road does not at any point deviate more than two miles from a direct straight line, and connects with the Sioux City and St. Paul road at the most southerly point possible in O'Brien county, the whole line being within an average distance of nine miles from the forth-third parallel of north latitude. The act of 1864, requiring such intersection to be made in O'Brien county, and the line to be run in a westerly direction, by the most practicable route on or near the forty-third parallel. The affidavits of these engineers allege that the road as constructed is in fact the most practicable one that could have been adopted; that it is shorter by several miles than any other, and that, on account of undue expense, both in construction and operation, adherence to the line of definite location would have been injurious to the company, and the greater length of road and frequent curves would have been detrimental alike to the company, to the community through which the line passes and

to the United States. So far as the records of the department are referred to, I find that they corroborate the statements presented by the company. The greatest deviation from the original line is about five miles, and occurs at a point where in leaving the old projected line of 1846, on the east line of Clay county, as required by your office, the survey of 1868, strikes northward to form a line of connection with the changed location of the Sioux
31 City and St. Paul road. This sharp angle is avoided in construction by taking a point of departure far to the eastward, and running a nearly straight line directly toward the terminal point cutting off the angle, and reaching a line of settled towns of importance to the commercial interests of the road and the people of the neighborhood. The next important variation is made at a point on the west line of range 38, where the deflection northward occurs, which is explained by the mistake of the surveying party in striking the west line of Clay county too far to the south, as alleged in the affidavit of Engineer Shepard. The deviation at this point is a little less than three miles and the construction, as in the other case, cuts off an objectionable angle in the line of definite location. The deviation of about two miles in width from the west line of range 39 to Sheldon, avoids a similar angle on the north, continues the straight and direct course of the road and carries it nearly to the forty-third parallel as recited in the affidavits; thus more nearly complying with the terms of the granting act. Upon the whole case, in view of all the circumstances and of all the explanations presented in behalf of the company, I am of the opinion that the identity of the road is not destroyed by the deviations in construction from the original line, and that the State is entitled to have patents for the granted lands.

The papers are forwarded for your appropriate action in accordance with this decision.

Very respectfully, C. SCHURZ, *Secretary.*

The Commissioner of the General Land Office.

Defendant objects to Exhibit "D" up to Exhibit "D 5," inclusive, upon the following grounds:

1. That the same is irrelevant, incompetent and immaterial.

Objection overruled by the court.

Defendant excepts.

Plaintiff next offers in evidence a letter from the Commissioner of the General Land Office under date October 22, 1868, to D. C. Shepard, chief engineer of the McGregor and Sioux City
32 R. R. Co., and marks the same Plaintiff's Exhibit "E." (See page 155½ of Transcript.)

PLAINTIFF'S EXHIBIT "E."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *October* 22, 1868.

D. C. Shepard, Esq., chief engineer McGregor and Sioux City R. R. Co., Minneapolis, Minn.

SIR:—Pursuant to your letters dated the 1 and 12 inst., I herewith transmit copy of diagram showing the located line of the McGregor Western railroad in Iowa from McGregor to the western bound-ry of Clay county, township 95, range 35, and the proposed line of said road through Clay and O'Brien counties to the intersection of the then proposed line of Sioux City and St. Paul road.

The fee for furnishing said diagram amounts to five dollars, which you will please remit and upon the receipt of same will be paid into the U. S. Treasury.

In answer to your inquiry regarding the latitudes allowed to railway companies to deviate from the located line of road, I have to say: That after the located limits have been laid down on the official plats based upon the report of the final location of the road, we can take no official cognizance nor give acquiescence to any change of route immaterial or otherwise and which may be supposed incidental to the construction of the road but the adjustment will be completed without any reference thereto.

By the act of Congress of May 12, 1864, it is required that a map be duly filed in the department properly authenticate l showing the located line of road through Clay and O'Brien counties to the point of intersection with the Sioux City and St. Paul railroad. As to the forms of authentication to be attached to map I herewith enclose printed circular No. 15, giving the required forms.

Respectfully, your obedient servant,

JAS. S. WILSON,
*Commissioner.*

33 Defendant objects as immaterial.
Objection overruled. Defendant excepts.

Plaintiff next offers in evidence certificate of the governor of Iowa under date of November 30, 1878, to the completion of the Chicago, Milwaukee and St. Paul R. R. Makes the same Plaintiff's Exhibit "F." (See page 101 of Transcript.)

PLAINTIFF'S EXHIBIT "F."

THE STATE OF IOWA, *ss.*

To the Secretary of the Interior:

In accordance with the provisions of an act of Congress approved May 12, 1864, entitled: "An act for a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of a railroad in said State," and of sundry acts of the General Assembly of this State, to wit: Chapter one hundred and forty-four (144) of the acts

of the Eleventh General Assembly which took effect May 10, 1866, chapters sixteen (16) and fifty-eight (58) of the acts of the Twelfth General Assembly which took effect respectively February 29 and April 3, 1868, copies whereof, or extracts therefrom, are hereto attached, I do hereby certify that in pursuance of the requirements of said acts of Congress and the General Assembly, and of chapter twenty-one (21) of the acts of the Seventeenth General Assembly of this State, which took effect February 28, 1878, an extract wherefrom is hereto attached. The Chicago, Milwaukee and St. Paul Railway Company has completed in good, substantial and workmanlike manner, similar in style, and of a quality equal to the average of first-class Western railroads, a railroad from the town of Algona in the county of Kossuth, in this State, in a westerly direction by the most practicable route on or near the forty-third parallel of north latitude, to the town of Sheldon, in the county of O'Brien, in this State, which town is on the line of the Sioux City and St. Paul railroad.

And I do further certify that said railroad thus constructed is a part "of a railroad from a point at or near the foot of Main street, South McGregor, in the State of Iowa," in a westerly direction by the
34 most practicable route on or near "the forty-third parallel of north latitude," to a point of intersection with a "road running from Sioux City to the Minnesota State line, in the county of O'Brien in said State" as contemplated in said act of Congress approved May 12, 1864. And I do further certify that the whole of said last-mentioned railroad is now completed and in running order.

In testimony whereof I have hereunto set my hand, caused to be affixed the great seal of the State of Iowa this tenth day of November, A. D. 1878.

JNO. H. GEAR.

By the governor of the State of Iowa.

[SEAL.] JOSIAH T. YOUNG,
*Secretary of State.*

Defendant objects for the reason it is immaterial and the same is not recorded in O'Brien county as provided by chapter 186 of the Laws of Eighteenth General Assembly of Iowa.

Objection overruled.

Plaintiff next offers in evidence certificate of the governor of Iowa to the Secretary of the Interior to the completion of the Chicago, Milwaukee and St. Paul R. R. Co. of 182 and $\frac{2}{10}$ miles of said road under date December 5, 1870, and certified by the Commissioner of the General Land Office under date of April, 1887, and makes the same Plaintiff's Exhibit "G." (See page 101½ of Transcript.)

PLAINTIFF'S EXHIBIT "G."

STATE OF IOWA, EXECUTIVE DEPARTMENT,
DES MOINES, *December* 5, 1870.

In pursuance of an act of Congress, entitled "An act for a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of a railroad in said State," and of chapter 144 of the Eleventh General Assembly of the State of Iowa, entitled "An act to accept the grant of land to the State of Iowa, made by act of Congress of May 12, 1864, and to carry out the provisions of said act entitled," etc., approved April 20th, 1866, and of chapter 16 of the Acts of the Twelfth General Assembly of said State, ap-
35 proved February 27, 1868, entitled "An act to resume all the lands and rights conferred upon the McGregor Western Railroad Company, by or under an act of Congress approved May 12, 1864," and of chapter 58 of the Acts of the same General Assembly, approved March 31, 1868, entitled "An act making a grant of land to the McGregor and Sioux City Railway Company, or, in case of their failure to accept the same, to the Forty-third Parallel Company, and to execute the trust conferred by act of Congress, entitled, 'An act for a grant of land, etc.'" copies of which acts of the General Assembly are hereto attached, marked respectively A, B and C.

I, Samuel Merrill, governor of the State of Iowa, do hereby certify that the annexed maps constitute a correct delineation of the completed part of the railroad contemplated in said act of Congress, "from McGregor, in said State, in a westerly direction, by the most practicable route, on or near the forty-third parallel of north latitude," etc.; that said road was built in a good, substantial and workmanlike manner, and in a style and of a quality equal to the average of first-class Western roads; and that said road is completed to Algona, in Kossuth county, a distance of $182\frac{3}{100}$ miles by the line of said road from the city of McGregor.

Given under my hand and the great seal of the State of Iowa, at the capital, this 5th day of December, A. D. 1870.

[SEAL.] SAM'L MERRILL.

By the governor:

ED WRIGHT,
*Secretary of State.*

STATE OF NEW YORK,
*City and County of New York.*

I, Russell Sage, on oath say that I am the president of the McGregor and Missouri River Railway Company, and that their road is completed and equipped from the city of McGregor to the village of Mason City, in section 16, township 96, range 20 west, a distance of 120 miles or thereabouts, in accordance with the act of Congress approved May 12, 1864, granting land to aid in the construc-

36 tion of said railway, by the name of the McGregor Western railroad, and the acts of the General Assembly of the State of Iowa concerning the same.

RUSSELL SAGE,
*President McGregor and Missouri River Railway Company.*

Subscribed and sworn to before me this 30th day of December, 1869. Witness my hand and notarial seal.

[SEAL.] E. E. KENDRICK,
*Notary Public.*

County of New York, No. 50 Exchange place.

STATE OF MINNESOTA, }
*County of Hennepin.* }

D. C. Shepard, of Minneapolis, in said county and State, being duly sworn, deposes and says that he is the chief engineer of the McGregor and Missouri River railway; that said railway from the village of Mason City, in section 9, township 96, north range 20 west to the village of Algona, in section 1, township 95 north, range 29 west, being $52\frac{3}{100}$ miles as shown by the line of route in connection with the lines of the public surveys on this map, has been completed and equipped as required by law, and that this line of route shows the correct location of the said railway.

D. C. SHEPARD.

Sworn and subscribed before me this 12th day of October, 1870.

THOMAS LOWRY,
[SEAL.] *Notary Public, Minnesota.*

It is hereby certified that D. C. Shepard is the chief engineer of the McGregor and Missouri River railway, and that the location of the road, as represented on this map, is correct and approved by the company, and also that the said portion of the said road has been completed and equipped in all respects as required by law.

McGREGOR AND MISSOURI RIVER R'Y CO.,
[SEAL.] By RUSSELL SAGE, *President.*
Attest: J. M. BOKEE,
*Assistant Secretary.*

Defendant objects as incompetent and immaterial.

37 Objection overruled.
Defendant excepts.

Plaintiff next offers in evidence as exemplifications from the records of the Commissioner of the General Land Office of patent to the lands in controversy from the United States to the State of Iowa, and asks the same, marked Plaintiff's Exhibit "H." (See page 102 of Transcript.)

## PLAINTIFF'S EXHIBIT H.

To all to whom these presents shall come Greeting:

Whereas, by the act of Congress approved May 12th, 1864, entitled, "An act for a grant of lands to the State of Iowa in alternate sections, to aid in the construction of a railroad in said State, from Sioux City in said State to the south line of the State of Minnesota at such point as the said State of Iowa may select between the Big Sioux and the West fork of the Des Moines river," every alternate section of land designated by odd numbers for ten sections in width on each side of said road,

And whereas, it is further enacted "that in case it shall appear that the United States have, when the line or route of said road is definitely located, sold any section, or any part thereof granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same," then, so much land in alternate sections, or part of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached, shall be held by the State of Iowa for the uses and purposes aforesaid. Provided, that the lands so selected shall in no case be located more than twenty miles from the line of said road,"

And whereas, there has been filed in this office, through the Secretary of the Interior, under date of July 26th and August 10th, 1872, and February 10th, 1873, evidence of the completion of the first, second, third, fourth and fifth sections of ten miles each, of the Sioux City and St. Paul railroad from the south line of the State of Minnesota southerly to a point in section 16, township 92, range 45, making in all, fifty continuous miles of said road;

38 And whereas, the sections and parts of sections of land inuring to the State of Iowa in aid of the construction of the Sioux City and St. Paul railroad, for the said fifty miles of road, have been selected and reported to this office in accordance with the act, and the rules and regulations of the General Land Office, as shown by the original lists of selections dated August 1st, 1872, and February 25th, 1873, and certified under dates of August 1st, 1872, and March 5th, 1873, by the register and receiver at Sioux City, Iowa; the said tracts being described as follows, to wit: North of base line and west of the fifth principal meridian, Iowa.

*Twenty-Mile Limits.*

Northeast quarter of section one, township ninety-five, range forty-one, west of the fifth principal meridian, containing one hundred and sixty acres, and other lands.

The said tracts as described in the foregoing pages from number two to number thirteen inclusive, containing the aggregate area of ($205,374\frac{76}{100}$) two hundred and five thousand, three hundred and seventy-four and seventy-six hundreths of an acre.

Now know ye, that the United States of America in consideration of the premises and pursuant to the said act of Congress have given and granted, and by these presents do give and grant unto the said State of Iowa for the use and benefit of the Sioux City and St. Paul Railroad Company of said State, and its assigns, the tract of land selected and provided and described in the foregoing.

To have and to hold, the said tracts with the appurtenances unto the said State, for the use and benefit of the said Sioux City and St. Paul Railroad Company, and its assigns forever.

In testimony whereof, I, Ulysses S. Grant, President of the United States, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington this seventeenth day of June, in the year of our Lord one thousand
39 and eight hundred and seventy-three, and of the Independence of the United States the ninety-seventh.

By the President.

U. S. GRANT.

[SEAL.] By J. D. WILLIAMSON, *Secretary.*

EUGENE A. FUSKE,
*Acting Recorder of the General Land Office ad Interim.*

Defendant objects as immaterial, incompetent and for the further reason it is not shown to have been placed on record of O'Brien county, as provided by law.

That said exhibit does not purport to have been made pursuant to any act of plaintiff's grantors, or to have been done in compliance to the act of Congress of May 12, 1864.

That said patent does not purport to — any said land to plaintiff or to any of plaintiff's grantors.

Objection overruled.

Defendant excepts.

Plaintiff next offers in evidence the decree of the United States circuit court for the southern district of Iowa in a case wherein The Chicago, Milwaukee and St. Paul Railroad Company, was complainant, and The Sioux City and St. Paul Railroad Company, *et al.*, were defendant-, and marks the same Plaintiff's Exhibit "I." (See page 103 of Transcript.)

Defendant objects for the reason it is incompetent, irrelevant, immaterial; that it does not purport to be a decree of any court wherein the United States, or State of Iowa, or this defendant, or any of them, were made parties, plaintiffs or defendants, or became such parties to said suit.

Objection overruled.

Defendant excepts.

40 PLAINTIFF'S EXHIBIT "I."

United States Circuit Court, Southern District of Iowa, May Term, 1886, Friday, May 21, 1886.

CHICAGO, MILWAUKEE AND ST. PAUL RAILROAD COMPANY
*vs.*
SIOUX CITY AND ST. PAUL RAILROAD COMPANY *et al.* } No. 1481. Eq.

This day comes complainant, by John W. Cary, its solicitor, and files the mandate of the Supreme Court of the United States in the words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America: To the honorable, the judges of the circuit court of the United States for the southern district of Iowa, Greeting:

Whereas, lately in the circuit court of the United States for the district of Iowa, in a cause between The Chicago, Milwaukee and St. Paul Railway Company, complainant, and The Sioux City and St. Paul Railroad Company, Alexander H. Rice and Elias F. Drake, trustees:

John H. Gear, governor, and James K. Powers, register or the State land office of the State of Iowa, defendants, wherein the decree of the said circuit court entered in said cause on the 18th day of May, A. D. 1882, is in the following words, viz:

"This cause having been heretofore brought on to be heard upon the pleadings filed and proofs taken therein, and the said pleadings and proofs having been read, and Messrs. John W. Cary, Thomas Updegraff and Melbert B. Cary, of counsel for the complainant, and Messrs. E. C. Palmer and J. H. Swan, of counsel for the defendants, The Sioux City and St. Paul Railroad Company, and

Alexander H. Rice and E. F. Drake: having been heard, and the court having duly considered the pleadings and proofs and arguments, and it appearing to the court that the lands hereinafter
41 described were granted by an act of Congress, approved May 12, 1864, to the State of Iowa, in trust to aid in the construction of a railroad from Sioux City, in said State, to the south line of the State of Minnesota, at such point as the State of Iowa might select between the Sioux and West fork of the Des Moines river, and also to aid in the construction of a railroad from a point at or near the foot of Main street, in South McGregor, in said State, in a westerly direction by the most practicable route on or near the forty-third parallel of north latitude until it shall intersect the said road running from Sioux City to the Minnesota State line, in the county of O'Brien, in said State, and it appearing that it was the intention of Congress that the companies constructing said railroads respectively should share equally the lands hereinafter described in compliance

with the terms and conditions of the said granting act; and it further appearing that the General Assembly of the State of Iowa, by an act approved April 3, 1866, granted and conferred upon the Sioux City and St. Paul Railroad Company that portion or interest in the lands hereinafter described pertaining to the line of road from Sioux City to the Minnesota State line, upon certain conditions named in the said act, and the General Assembly of the State of Iowa by an act approved February 27, 1878, granted that portion or interest in the lands hereinafter described pertaining to the line of road from McGregor to the intersection of O'Brien county to the complainant, save and except section 13, township 99, range 42 west, and the right of way as excepted in said act, on condition that it should extend its then present line of railroad from McGregor to Algona, from Algona via Emmetsburg and Spencer, by the most direct and practicable route, to a point of connection with the Sioux City and St. Paul railroad within one-half mile of the corporate limits of Sheldon, in O'Brien county, on or before the first day of January, 1880. And that the complainant and defendant, Sioux City and St. Paul Railroad Company, have fully complied with all the terms and conditions of said act of Congress, and of the legislature of the State of Iowa, and complainant has caused a certificate of the completion of said railroad from Algona, via Emmetsburg and Spencer, to a point of connection with the Sioux City
42 and St. Paul railroad within one-half mile of the corporate limits of Sheldon, in O'Brien county, signed by the governor of the State of Iowa, to be filed with the Secretary of the Interior, as required by said act of Congress, and each of said companies are entitled to an undivided moiety of the lands hereinafter described. And it further appearing that the Secretary of the Interior has patented all the lands hereinafter mentioned, amounting to one hundred and eighty-nine thousand five hundred and ninety-five $\frac{89}{100}$ acres to the State of Iowa, erroneously designated the same in trust solely for the use and benefit of the defendant, The Sioux City and St. Paul Railroad Company, and that the governor and the register of the State land office of said State of Iowa, has certified one hundred and thirty thousand nine hundred and $\frac{98}{100}$ acres of said lands to the defendant, The Sioux City and St. Paul Railroad Company, subject, however, to all conflicting claims, and that by virtue thereof the defendant, The Sioux City and St. Paul Railroad Company, claims to own said lands, and also claims that it is entitled to have the remaining fifty-eight thousand six hundred and ninety-five acres conveyed to it by said State.

And it further appearing to the court, that on or about the first day of August, 1871, the defendant, The Sioux City and St. Paul Railroad Company, made and executed to the defendants Alexander H. Rice and E. F. Drake, trustees for the holders of the bonds hereinafter mentioned, a mortgage of all the lands granted by Congress by the act approved May 12, 1864, lying and being in the State of Iowa, that might thereafter be patented or transferred by the United States or the State of Iowa, to the defendant, The Sioux City and St. Paul Railroad company, or to which said company might acquire

title by reason of said grant to secure the payment of two millions, eight hundred thousand dollars of bonds to be issued by said company and that the defendants, Alexander H. Rice and E. F. Drake, trustees, claim that said mortgage or trust deed is a lien upon all said lands.

And it further appearing that the defendants, The Sioux City and St. Paul Railroad Company has sold, leased, or otherwise encumbered certain of the lands hereinafter mentioned and has received certain sums of money therefor, and it *is* further appearing that certain of said lands have been sold in pursuance of an agreement between said complainant and defendants and the proceeds deposited with the First National Bank of St. Paul, to abide the result of this suit: It is ordered, adjudged and decreed, and this court by virtue of the power therein vested, doth order, adjudge and decree that the complainant herein, The Chicago, Milwaukee and St. Paul Railway Company, is the owner of and entitled to and is hereby invested with the title in fee, to an equal, undivided one-half of all the lands hereinafter described save and except the right of way, as excepted in said act of the General Assembly of the State of Iowa, approved February 27, 1878, and clear of all incumbrance made or placed thereon by the defendants of any or either of them, which said lands are particularly described as follows:

43

List of lands within ten-miles limits of C., M. & St. P. railway and outside the ten-miles limits and within the twenty-miles limits of of S. C. & St. P. railroad which have been patented by the United States to the State of Iowa to aid in constructing the S. C. & St. P. railway, but which have not yet been conveyed by the State.

All of section one (1,) township ninety-five (95,) range forty-one (41,) west, and other lands.

And it is further ordered and decreed that the defendant, The Sioux City and St. Paul Railway Company, Alexander H. Rice and E. F. Drake, within sixty days after service upon them of a copy of this decree by a proper and sufficient deed of conveyance release and quitclaim to the complainant, The Chicago, Milwaukee and St. Paul railway, with covenants against their own acts said equal undivided one-half of all said lands except the said right of way. It is further ordered and adjudged and decreed that the said deed of trust or mortgage is as aforesaid executed by the defendant, The Sioux City and St. Paul Railroad Company, to the defendants, Alexander H. Rice and E. F. Drake, be vacated, set aside, annulled and cancelled as to the said undivided one-half of said lands which is hereby vested in the Chicago, Milwaukee and St. Paul Railway Company and that as to all of said undivided one-half of said land so vested in the complainant all mortgages, leases or encumbrances put thereon by the said defendants or either of them be and are vacated, set aside, annulled and cancelled. It is further ordered and adjudged and decreed that the partition of said lands be made, and that John A. Elliott, Wm. C. Hillis and Edwin R. Mason be and are hereby appointed commissioners to make partition thereof, and that as soon as possible said commissioners proceed to make a partition thereof, giving and allot-

44

ting to said complainant, Chicago, Milwaukee and St. Paul Railway Company and equal moiety of all said lands, and the other moiety thereof to the defendant, The Sioux City and St. Paul Railroad Company, having due regard in said partition to quality, quantity and value thereof, the opinion of a majority of said commissioners to prevail in cases of disagreements. It is further ordered and adjudged and decreed that said defendant, The Sioux City and St. Paul Railroad Company, do pay to the complainant the costs of this suit to be taxed, and either of the parties are at liberty to apply to this court as occasion m-y require.

As by the inspection of the transcript of the record of the said circuit court which was brought into the Supreme Court of the United States by virtue of an appeal taken by the Sioux City and St. Paul Railroad Company, and Alexander H. Rice, and E. F. Drake, trustees, and a cross-appeal taken by the Chicago, Milwaukee and St. Paul Railway Company, agreeably to the acts of Congress in such cases made and provided fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand, eight hundred and eighty-five, the said cause came on to be heard before the said Supreme Court on the said transcript of record on appeal, or cross-appeal, and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this court that so much of the decree of the said circuit court in this cause as holds that $50,532\frac{73}{100}$ acres of the lands in controversy within the ten-miles limits of both roads belong to both the companies in equal undivided moieties, and opportunity comes now to make partition of them, and so much of the decree of said court dividing equally between the parties the $42,188\frac{93}{100}$ acres found to be within the twenty-miles indemnity limits of both roads and not within the ten-miles or absolute granted limits of either road, be and the same is hereby affirmed; and that in all other respects the decree of said court be, and the same is hereby reversed, each appellant to pay the costs of its appeal in this court.

And it is further decreed that this cause be, and the same is hereby remanded to the circuit court of the United States for the southern district of Iowa, with directions to enter a decree in conformity with the opinion of this court. March 29, 1886.

You therefore are hereby directed that such further proceedings be had in said cause in conformity with the opinion and decree of this court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Morrison R. Waite, Chief Justice of said Supreme Court, the fifteenth day of May, in the year of our Lord one thousand eight hundred and eighty-six.

(Signed) JAMES H. McKENNEY,
*Clerk of the Supreme Court of the United States.*

FRIDAY, *May* 21, 1886.

*Decree.*

This cause came on to be further heard on the pleadings and proofs, and the mandates and decisions of the Supreme Court of the United States, John W. Cary appearing as counsel for the complainant and J. H. Irwin as counsel for the defendant, and after hearing counsel, and the said pleadings, proofs, mandate and opinion of the Supreme Court having been duly considered, and it appearing to the said court that the said complainant had fully complied with all the conditions of the act of Congress approved May 12, 1864, 'granting lands to the State of Iowa to aid in the construction of a railroad from the foot of Main street, South McGregor, State of Iowa, in a westerly direction by the most practicable route, on or near
46 the forty-third parallel of north latitude until it should intersect the road running from Sioux City to the Minnesota State line in the county of O'Brien, in said State."

And with the act of the legislature of the State of Iowa, approved February 27, 1878, conferring said grant upon the complainant, and had fully completed said railroad within the time specified in said act of Congress and said act of the legislature, and is entitled to receive all the lands contained in said grant not heretofore granted by the State of Iowa.

And it further appearing to said court that the said defendant, Sioux City and St. Paul Railroad Company, has fully complied with all the conditions of said act of Congress, approved May 12, 1864, "granting certain lands in the State of Iowa to aid in the construction of a railroad from Sioux City in said State to the south line of the State of Minnesota, at such point as the State of Iowa might select between the Big Sioux and the West fork of the Des Moines river," and with the act of the legislature conferring the said grant upon the said Sioux City and St. Paul Railroad Company, and has fully completed said railroad within the time specified in the said act of Congress and the said act of the legislature, from the said State line of the State of Minnesota in a southerly direction to Le Mars, in said State of Iowa, a distance of 56 and $\frac{28}{100}$ miles, and that it is entitled to receive all the lands applicable to said grant from said State line of the State of Minnesota to said Le Mars to the extent of ten sections per mile of said road completed.

And it further appearing that the following-described lands marked class No. two, (2,) to wit:

All of section 1, township 95, north range 61, west of the fifth principal meridian, are a part and portion of said grants so made by said act of Congress to aid in the construction of a railroad from the foot of Main street of South McGregor, in the State of Iowa, in a westerly direction, by the most practicable route, on or near the forty-third parallel of north latitude until it should intersect the road running from Sioux City to the Minnesota State line in the county of O'Brien in said State, and are situated wholly within
47 the granted limits, that is within the ten miles of the definitely located line of said complainant, and not within the

granted limits or within the ten-miles limits of the located line of the said defendant, Sioux City and St. Paul Railroad Company, and that the complainant is entitled thereto and that patents should have been issued therefor to said complainant, but that by mistake all of said lands of said class two, marked patented, have been erroneously and wrongfully patented to the defendant, Sioux City and St. Paul Railroad Company, and that said last-named company should release said lands to said complainant, and that all the rest and residue of said lands of said class two, not marked patented, should be patented to the said complainant by said State of Iowa.

It is further ordered, adjudged and decreed that all the lands mentioned and described in class No. 2, above mentioned, are a part and portion of said grants so made by said act of Congress, and are situated wholly within the granted limits, that is within ten miles of the definitely located line of said complainant, and not within the granted limits or within ten miles of the located line of the said defendant, Sioux City and St. Paul Railroad Company, and that the complainant is entitled thereto, and that the State of Iowa, or the proper officers of said State should of right make, execute and deliver to the said complainant patents for all of said lands mentioned and described in class No. 2, not heretofore patented.

And it is further ordered, adjudged and decreed, and this court, by the power herein vested, doth order, adjudge and decree that the complainant herein, The Chicago, Milwaukee and St. Paul Railway Company, is the owner, and is entitled to and is hereby vested with the title in fee to the whole of the said lands above mentioned and described as class No. 2, free and clear of all incumbrance, made or placed thereon by the defendants or either of them.

It is further ordered, adjudged and decreed that the said defendant, The Sioux City and St. Paul Railroad Company, release and convey to said plaintiff all of said lands mentioned in class No. 2, which have heretofore been patented to the said defendant
48 by the State of Iowa, the title to which is now held by said defendant company with covenants against their own acts free, released and discharged from the lien of the mortgage deed of trust executed by said Sioux City and St. Paul Railroad Company to Elias F. Drake and Alexander H. Rice, as trustees.

And it is further ordered, adjudged and decreed that the lien of said mortgage be and the same is hereby vacated, released and set aside as to all of said lands mentioned and described in said class No. 2.

(Signed) J. M. LOVE, *Judge.*

Filed May 21, 1886.

E. R. MASON, *Clerk.*

THURSDAY, *October* 28, 1886.

This cause came on this day for hearing. The complainant appears by George E. Clark, and defendant appearing by J. H. Swan, and consenting thereto, it is now ordered that the report of commissioners of partition, made under and in pursuance of the decree

entered in this cause at the May term, 1886, be and the same is hereby in all respects ratified, approved and enforced.

Plaintiff next offers in evidence the letter of August 1, 1864, from the register and receiver of Sioux City, Iowa, to the Commissioner of General Land Office.

Also a letter from the Commissioner of the General Land Office to the register and receiver at Fort Dodge, Iowa, dated September 12, 1864, and has the same marked Exhibit "K."

No objection.

PLAINTIFF'S EXHIBIT "K."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *Sept.* 12, 1864.

Register and receiver, Fort Dodge, Iowa.

GENTLEMEN: The Secretary of the Interior, under date of September 8th inst., at the request of Hon. Wm. B. Allison, member of Congress from Dubuque, Iowa, and of the officers of the McGregor and Western railroad, has directed that all the odd-numbered sections of public lands in Iowa, within twenty miles on each side of said railroad, should be withdrawn from the market under
49 the provisions of sections five and eight of the act of Congress, approved May 12, 1864, until the grant is fully adjudicated.

You are, therefore, hereby instructed to withdraw from sale, location, homestead entry or pre-emption claim all the odd-numbered sections of public land in your district, now subject to sale, from the date of the receipt of this letter within twenty miles on each side of said McGregor Western railroad to its intersection in O'Brien county with the contemplated railroad from Sioux City to the Minnesota State line, said point not being now determined.

The receipt of this letter you will promptly acknowledge, stating the date at which it reached you, thus interdicting thereafter the disposal of any tract of odd-numbered sections with- the limits in this letter mentioned.

I am very respectfully your obedient servant,

J. M. EDMUNDS,
*Commissioner.*

Register and receiver, Sioux City, Iowa.

Letters same as above sent to register and receiver at Sioux City, Iowa.

Plaintiff next offers in evidence letter dated February 4, 1869, from the Commissioner of the General Land Office to the register and receiver at Sioux City, Iowa, and one dated March 15, 1870, from the Commissioner of the General Land Office to the register and receiver at Sioux City, Iowa, and one dated May 11, 1870, and has the same marked Exhibit "L." (See page 105 of transcript.)

PLAINTIFF'S EXHIBIT "L."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *February* 4, 1869.

GENTLEMEN: The McGregor and Sioux City Railroad Company of Iowa (formerly the McGregor Western), under act of Congress approved May 12, 1864, Statute-, vol. 13, p. 72, have filed an authenticated map of the definite location of their road through townships 95 and 96 of range 35, 36, 37 and 38 west, Clay county, Iowa.

50 I herewith enclose to you a diagram showing by blue lines the ten-miles limits of the grant, in place, with ten additional miles indemnity limits as indicated by yellow lines to make up the indemnity.

You are hereby directed to withhold from sale, or other disposal, all the odd-numbered sections within the said ten miles on each side of the road, and also within the additional ten-miles indemnity limits.

The register will proceed at once to lay down distinctly in pencil on the township plats the line of road, with the ten-miles limits "in place," and the ten-miles indemnity limits, then make the proper notes showing the odd sections to be reserved.

The vacant undisposed of, odd-numbered sections within the ten-miles limits of said road, as indicated in the diagram inure "in place" to the State for said company except wherein there exist pre-emptions having prior inceptions.

In virtue of the act of Congress approved March 27th, 1854, the even sections within the granted limits are subject to pre-emption at $2.50 per acre, and must be dealt with accordingly and in like manner under the homestead law, which reduces the quantity to 80 acres.

This order will take effect from and after its receipt by you.

You will please acknowledge the date of the receipt heerof, and refer as letter "M."

Very respectfully, JOS. S. WILSON,
*Commissioner.*

Register and receiver, Sioux City, Iowa.

DEPARTMENT OE THE INTERIOR,
GENERAL LAND OFFICE, *March* 15, 1870.

Register and receiver, Sioux City, Iowa:

GENTLEMEN: Herewith I transmit diagram showing the line of road and established limits of ten and twenty miles of the McGregor and Missouri River railroad through O'Brien county, Iowa, to the point of intersection with the Sioux City and St. Paul railroad.

51 You will please note said limits in your record and acknowledge receipt of diagram by referring as letter "M" by its date.

Very respectfully, JOS. S. WILSON,
*Commissioner.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *May* 11, 1870.

Register and receiver, Sioux City, Iowa.

GENTLEMEN: I have received your letter of 2'd March last, acknowledging the receipt of our letter of 15th following and accompanying diagram, and asking further instructions.

1st. That the ten-miles limits indicated upon the present diagram of the McGregor and Sioux City railroad for that portion through O'Brien county will be the proper one for your guidance in allowing pre-emption and homestead entries upon even sections.

2nd. The even-numbered sections and parts of sections embraced within the ten-miles limits indicated upon diagram furnished 24th October, 1864, but now fall outsidé of the true ten-miles limits of the present diagram and still within the indemnity limits of twenty miles will be restored to entry at $1.25 per acre, after your giving at least thirty days' notice, a copy of which should be sent to this office.

I have to say in regard to the instructions issued 24th October, 1864, that the line of road running through O'Brien county was not definitely fixed at the time and for such portion of that line was only a temporary withdrawal. Be pleased to acknowledge receipt and refer as letter "M" by date.

Very respectfully, JAS. S. WILSON,
*Commissioner.*

Defendant objects as immaterial and incompetent and not having been recorded in O'Brien county as provided by law.

Plaintiff next offers in evidence the original patent from the State of Iowa to the Chicago, Milwaukee and St. Paul Railroad Company filed for record with recorder of deeds of O'Brien
52 county, Iowa, on the 15th of November, 188–, in Book 23 of Deed Record-, page 436, and marks the same Plaintiff's Exhibit "M."

PLAINTIFF'S EXHIBIT "M."

Whereas, by act of Congress approved May 12, 1864, a grant was made to the State of Iowa for the purpose of aiding in the constructing of a railroad from Sioux City in said State to the south line of the State of Minnesota at such point as the said State of Iowa may select between the Big Sioux and the West fork of the Des Moines river, also to said State for the use and benefit of the McGregor Western Railroad Company for the purpose of aiding in the construction of a railroad from a point at or near the foot of Main street, South McGregor, in said State, in a westerly direction by the most practicable route on or near the forty-third parallel of north latitude until it shall intersect the said road running from Sioux City to the Minnesota State line in the county of O'Brien, in said State.

And whereas, the grant thus made to the said State for the use and benefit of the McGregor and Western Railroad Company was resumed by act of the Twelfth General Assembly of Iowa, approved

February 27, 1868, and was by act of the same General Assembly approved March 31, 1868, granted to the McGregor and Sioux City Railway Company.

And whereas, this grant was again resumed by act of the Seventeenth General Assembly, approved February 27, 1878, and was by the same act granted to and conferred upon the Chicago, Milwaukee and St. Paul Railway Company upon certain terms and conditions set forth in the said act, which terms and conditions have been complied with by the said railroad company.

And whereas, the lands hereinafter described situated in the county of O'Brien, Iowa, lying within the ten-mile limits of the railroad from McGregor, westward, to the junction in O'Brien county, as aforesaid, and outside of the ten-mile limits of the railroad from Sioux City to the northern boundary of Iowa, as aforesaid, have heretofore been patented by the United States to the State of Iowa under said railroad grant of May 12, 1864, to aid in
53 the construction of the railroad from Sioux City to the northern boundary of the State, but have been withheld by the State from patent to the railroad company that was by act of the General Assembly of the State made the beneficiary of the grant for building said road.

"And whereas, the circuit court of the United States for the district of Iowa at the May term, 1886, in a case entitled Chicago, Milwaukee and St. Paul Railway Company *vs.* Sioux City and St. Paul Railroad Company, Alexander H. Rice and Elias F. Drake, trustees; John H. Gear, governor, and James K. Powers, register of the State land office of the State of Iowa," in accordance with an opinion of the Supreme Court of the United States given in March, 1886, and under instructions from said court reached a decree in which it is held among other things as follows:

"That said complainant, Chicago, Milwaukee and St. Paul Railway Company, has fully complied with all the terms and conditions of said act of Congress granting said lands, so far as said lands were given to aid in the construction of a railroad from the foot of Main street, South McGregor, in the State of Iowa, in a westerly direction by the most practicable route, on or near the forty-third parallel of north latitude, until it should intersect the road running from Sioux City to the Minnesota State line, in the county of O'Brien, in said State, and with the act of the legislature of the State of Iowa, approved February 27, 1878, conferring said grant upon the complainant, and has fully completed said railroad within the time specified in said act of Congress and said act of the legislature, and thereby has become entitled to receive all lands entered in said grant not heretofore granted by the State of Iowa to other parties, and is now entitled to all said lands above described as pertaining to said grant."

And the court has further held in said decree as follows:

"It is further ordered, adjudged and decreed that all the lands mentioned and described in class No. 2, above mentioned, are a part and portion of said grants so made by said act of Congress, and are situated wholly within the granted limits, that is within ten miles

of the definitely located line of said complainant, and not
54 within the granted limits or within ten miles of the located line of the said defendant, Sioux City and St. Paul Railroad Company, and that the complainant is entitled thereto, and that the State of Iowa or the proper officers of said State should of right make, execute and deliver to the said complainant patents for all of said lands mentioned and described in said class No. 2, not heretofore patented.

"And it is further ordered, adjudged and decreed, and this court, by virtue of the power herein vested, doth order, adjudge and decree that the complainant herein, The Chicago, Milwaukee and St. Paul Railway Company is the owner of and entitled to, and is hereby invested with the title in fee to the whole of the lands above mentioned and described as class No. 2, free and clear of all encumbrances, made or placed thereon by the defendant or any or either of them."

Said lands lying in O'Brien county as aforesaid, being described as follows, to wit:

All of section 1, township 95, range forty-one, west of the fifth principal meridian, according to the original plats of Government surveys of said lands, and the same being a part of the lands embraced in class No. 2, referred to in the decree of the circuit court aforesaid, and not heretofore patented by the State of Iowa.

Now, therefore, I, William Larrabee, governor of the State of Iowa, in consideration of the premises and of the act of Congress, act of the General Assembly of the State of Iowa, and of the decree of the court herein referred to, do hereby convey unto the said Chicago, Milwaukee and St. Paul Railway Company, and to its assignees, the tracts of land heretofore particularly described, to have and to hold the same, together with all the rights, privileges, immunities and appurtenances of whatsoever nature, thereunto belonging, unto the said Chicago, Milwaukee and St. Paul Railway Company, and its assignees, forever, reserving, however, all rights of the settlers upon these lands.

In testimony whereof I have caused these letters to be made patent and the great seal of the State of Iowa to be hereunto affixed.

55 Given under my hand at Des Moines, the 27th day of September, in the year of our Lord, one thousand eight hundred and eighty-six, and of the State of Ohio the fortieth.

By the governor. WM. LARRABEE.

The defendant objects to the same for the reason the same is irrelevant, incompetent, immaterial; for the further reason the governor had no authority to issue the same, and the same is contrary to the terms and conditions of the act of Congress of May 12, 1864.

Objections overruled.

Plaintiff offers in evidence a deed from the Chicago, Milwaukee and St. Paul Railroad Company to the plaintiff, of date May 26, 1886, and marks the same Exhibit "N."

Defendants object upon the grounds that it is incompetent, irrelevant, immaterial; that it is not acknowledged by any officer as provided by law; it has not been shown that Alexander Mitchell was president of said railroad company, or that P. M. Myers was secretary of said company; nor has it been shown that said company had authority to hold or sell real estate, or had authority to execute said deed.

Objection overruled.

Defendant excepts.

PLAINTIFF'S EXHIBIT "N."

Chicago, Milwaukee and St. Paul Railroad Company,
to
Western Land Company.

*Warranty Deed.*

This indenture, made this 26th day of May in the year of our Lord one thousand eight hundred and eighty-six, between the Chicago, Milwaukee and St. Paul Railway Company, party of the first part, and the Western Land Company, a corporation organized and doing business under and by virtue of the laws of the State of Iowa, of Cedar Rapids, in the county of Linn, in the State of Iowa, party of the second part.

Witnesseth, that the said party of the first part, for, and in consideration of the sum of seventy-eight thousand, eight
56 hundred and eighty-five and ninety-five hundre-th dollars ($78,885.95), to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, remised, released, alienedand conveyed, and by these presents doth grant, bargain, sell, remise, release, alien and convey unto the said party of the second part, its successors and assigns forever, all those tracts, pieces or parcels of land situate, lying and being in the county of O'Brien, State of Iowa, known and described as follows:

All of section 1, township 95, range 41 west, and other lands.

Together with all and singular all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, and all the estate, rights, title, interest, claim or demand whatsoever of the said party of the first part, either in law or equity, either in possession or expectancy of, in and to the above-bargained premises as aboved described, and the hereditaments and appurtenances.

To have and to hold the above premises above described, with the hereditaments and appurtenances, unto the said party of the second part, and to its successors and assigns forever.

Duly acknowledged.

Plaintiff rests.

*Defendant's Testimony.*

The defendant to sustain the issues on his part introduced a certificate of the Secretary of War of the United States, dated on the

27th day of October, 1887, signed by William C. Endicott, Secretary of War, certifying that the annexed papers attached to said certificate are true and correct copies of the original on file in the office of the Quartermaster General of the United States, and certifying that the certificate attached thereto of the Quartermaster General of the United States is true and correct, and that the name thereto attached of the Quartermaster General, S. B. Holabird, is his genuine name.

The defendant also offers in evidence in connection with said certificate and certified copy attached to said certificate and ex-
57 hibit, a letter dated at Detroit, Michigan, on the 20th day of January, 1870, directed to Brevet Major General M. C. Meiggs, Quartermaster General of the United State Army, written by J. D. Bingham, Brevet Brigadier General and Quartermaster of the United States Army.

Also, a letter dated January 22d, 1870, directed to the attorney general of the State of Iowa, and written by J. D. Bingham, brevet brigadier general and quartermaster of the United States Army.

Also, a letter written by the attorney general of the State of Iowa, dated March 16th, 1870, and directed to General J. D. Bingham, of the United States Army.

Also, a letter dated at the Department of the Interior and General Land Office, April 1, 1870, directed to General M. C. Meiggs, quartermaster general of the United States Army, and written by J. P. Wilson, Commissioner of the General Land Office of the United States.

Also, a letter written at Milwaukee, Wisconsin, on the 20th day of April, 1870, directed to A. V. H. Carpenter, Esq., general passenger agent of the Milwaukee and St. Paul Railway Company, written by John W. Cary, general attorney for the Milwaukee and St. Paul Railway Company.

Also a letter dated at St. Paul, Minnesota, at the office of the chief quartermaster of the department of Dakota, dated April 25th, 1870, directed to Brevet Major General M. C. Meiggs, quartermaster general of the United States Army, at Washington, D. C., and written by S. B. Holabird, deputy quartermaster general of the United States Army, chief quartermaster.

Also a letter dated and written at the Department of the Interior in the General Land Office on June 13th, 1870, directed to General M. C. Meiggs, quartermaster general of the United States Army, written by Joseph S. Wilson, Commissioner of the General Land Office at Washington, D. C.

Also a letter written at the War Department in the quartermaster general's office, Washington, D. C., dated July 7th, 1870, di-
58 rected to the Hon. W. W. Belknap, Secretary of War, Washington, D. C., and written by M. C. Meiggs, quartermaster general of the United States Army.

Also a letter written at the War Department on July 12th, 1870, directed to the Attorney General of the United States, signed W. W. B., Sec'y of War.

Also a letter written in the quartermaster general's office at Wash-

ington, D. C., February 6th, 1868, directed to the Hon. Joseph S. Wilson, Commissioner of the General Land Office at Washington, D. C. Written and signed by D. H. Rucker, acting quartermaster general, brevet major general of the United States Army.

Also a letter written at the Department of the Interior and General Land Office, February 16th, 1868, directed to Daniel H. Rucker, acting quartermaster general of the United States Army, written by Joseph S. Wilson, Commissioner of the General Land Office of the United States.

Also a letter entitled Milwaukee and St. Paul railway, general attorney's office, Milwaukee, dated December 28th, 1869, directed to A. V. H. Carpenter, Esq., and written by John W. Cary, general attorney for the Milwaukee at St. Paul Railway Co.

Also a letter written at the quartermaster general's office, Washington, D. C., February 2d, 1870. Directed to Brigadier General J. D. Bingham, chief of quartermaster's department of the lakes, and signed by J. C. McFerron, deputy quartermaster general, acting quartermaster general of the United States Army.

Also a letter entitled, general ticket office Cincinnati and Dayton, and Dayton, Michigan and Cincinnati, Richmond and Chicago railroads, Cincinnati, Ohio, February 26th, 1870; directed to J. D. Bingham, brevet brigadier general, quartermaster of the United States Army, and signed by Samuel Stevenson, general ticket agent, Milwaukee, Wisconsin, dated February 26th, 1870.

Also a letter written to Samuel Stevenson, Esq., general ticket agent Cincinnati, Hamilton and Dayton railroad, Cincinnati, Ohio, dated at Milwaukee, Wisconsin, February 24, 1870, and signed by J. P. Whaling, auditor of said road.

59 Also a letter entitled, headquarters department of the lakes, chief quartermaster's office, Detroit, Michigan, March 1st, 1870; directed to Brevet Major General M. C. Meiggs, quartermaster general of the United States Army, and written by J. D. Bingham, brevet brigadier general of the United States Army.

Also letter entitled State of Iowa—the great seal of the State of Iowa—secretary of state, Des Moines, March 25, 1870; directed to General J. D. Bingham, chief quartermaster of the department of the lakes at Detroit, Michigan; written by Ed. Wright, secretary of the State of Iowa.

Also a letter entitled quartermaster general's office, Washington, D. C., November 14th, 1870; directed to Hon. W. W. Belknap, Secretary of War, and written by M. C. Meiggs, quartermaster general, brevet major general of the United States Army.

Also a letter entitled War Department, November 18th, 1870; directed to Hon. Attorney General; written by W. W. B., Secretary of War.

Also a letter entitled deputy quartermaster general's office, Minnesota, May 9th, 1871; directed to Col. D. H. Rucker, chief quartermaster military division of Missouri, Chicago, Ill.; endorsed by S. B. Halabird, deputy quartermaster general United States Army, and also endorsed by D. H. Rucker, assistant quartermaster general United States Army, chief quartermaster division of Missouri; also

a second endorsement as follows: "Quartermaster general's office, Washington, D. C., May 15th, 1871," which letter is written by M. C. Meiggs, quartermaster general, brevet major U. S. A.

Also a letter entitled Milwaukee and St. Paul railway, general freight agent's office, Milwaukee, June 2d, 1871; directed to R. H. Magee, agent, St. Paul; written by O. E. Butt, general freight agent.

Also a letter entitled deputy quartermaster general's office, St. Paul, Minnesota, June 19, 1871; directed to the quartermaster general U. S. A., Washington, D. C.; written by S. B. Holabird, deputy quartermaster general U. S. A.

60 Also a letter entitled Department of Justice, Washington, June 19th, 1871; directed to the Hon. W. W. Belknap, Secretary of War; written by Hon. B. H. Bristow, solicitor general and acting Attorney General of the United States, which letter contains the decision or opinion of the Attorney General in relation to the fact of that portion of the road extending from McGregor to Calmar not being a land-grant road.

Also a certified copy entitled as follows: "At a meeting of the directors of the McGregor Western Railway Company, held April 28th, 1868. Present, Cowdery, Buell, Bohee, Hubbard, Scott, Johnson, Whaling and Cary; absent, Green. Signed by McGregor and Western Railway Company; by N. A. Cowdery, vice-president; J. M. Bohee, assistant secretary.

All of said letters being attached to the first-named certificate copies in evidence are described therein, and defendant asks that the same are marked Defendant's Exhibit 1, (see page 147 of Transcript,) which is as follows:

DEFENDANT'S EXHIBIT "ONE."

HEADQUARTERS DEPARTMENT OF THE LAKES
CHIEF QUARTERMASTER'S OFFICE
DETROIT, MICHIGAN, *Jan.* 20, 1870.

Bvt. Maj. Gen. M. C. Meiggs, quartermaster general, U. S. A., Washington, D. C.

GENERAL: I have the honor to enclose herewith a copy of a report made by the attorney of the Milwaukee and St. Paul Railway Company relative to the land-grant portion of the McGregor and Western railroad, from which it appears that no portion of that road within the State of Iowa was built by the aid of the land grant, but that the land was given by the State to aid in the construction of the McGregor and Sioux City railway.

I respectfully request that I may be informed if this report, of the attorney, is correct.

I am, General, very respectfully, your obedient servant,

J. D. BINGHAM,
*Bvt. Brig. Gen. and Q. M., U. S. A.*

61 HEADQUARTERS DEPARTMENT OF THE LAKES,
CHIEF QUARTERMASTER'S OFFICE,
DETROIT, MICHIGAN, *Jan.* 22, 1870.

To attorney general of Iowa, Des Moines city, Iowa.

SIR: I have the honor to request you to inform me if the following statements furnished me by the attorney of the Milwaukee and St. Paul railway is correct, viz:

"The act of May 12, 1864, granted land to the State of Iowa for the McGregor and Western Railroad Company.

"The State afterward passed an act granting said land to the McGregor and Western Company, and in expectation of receiving said lands the company built about sixty miles of railroad, but never received any lands; and in 1868 the legislature of Iowa passed a law resuming the grant, and then granted the same to the McGregor and Sioux City Railway Company, which is engaged in building a road from Calmar to Yankton."

I am, sir, very respectfuly, your obedient servant,

J. D. BINGHAM,
*Bvt. Brig. Gen. and Q. M., U. S. A.*

STATE OF IOWA, OFFICE ATTORNEY GENERAL,
DES MOINES, *March* 16, 1870.

[The Great Seal of the State of Iowa.]

Gen. J. D. Bingham, U. S. A.

DEAR SIR: I regret very much that your letter of the 22d January should have remained so long unanswered. It was forwarded to Muscatine, where I reside; that and my absence in other parts of the State caused it to be overlooked.

The facts as detailed in your letter are in every particular correct, so far as the Iowa General Assembly is involved, and the company is engaged in the construction of their road. You will see, however, from a copy of the act, which I enclose, that Yankton was not the terminus of the road, and I heard when at Sioux City during the winter that the company did design going to Yankton.

Very respectfully, etc., HENRY O'CONNOR,
*Attorney General, Iowa.*

62 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *April* 1, 1870.

General M. C. Meiggs, quartermaster general, U. S. A.

SIR: I have received your letter of the 22d ult., accompanied by copy of one herewith of 28th December last from Jno. W. Cary, Esq., of Milwaukee, Wis., to A. V. H. Carpenter, Esq. You request to be informed as to whether the railroad now in operation between McGregor and Calmar, in Iowa, is a land-grant railroad. In answer I have the honor to state as follows:

First. Under the act of Congress of May 12, 1864, Statutes, vol. 13, p. 72, lands are granted to the State of Iowa in aid of the construction of a railroad from McGregor, in said State, thence in a westerly

direction by the most practicable route, on or near the forty-third parallel of north latitude, until it shall intersect the Sioux City and St. Paul railroad in O'Brien county, in said State.

Second. On the 30th August, 1864, the McGregor Western, now known as the McGregor and Sioux City Railroad Company, of Iowa, filed a map, showing the line of road laid down from McGregor to Calmar, and thence westerly to O'Brien county, in accordance with said act.

Third. We have also on file certificate from governor of Iowa, dated 14th January, 1870, to the effect that the McGregor and Sioux City railroad had been constructed under the aforesaid act from the village of McGregor via Calmar to the town of Mason, distance 120 miles.

Very respectfully your obedient servant,

J. P. WILSON,
*Commissioner.*

MILWAUKEE AND ST. PAUL RAILWAY,
GENERAL ATTORNEY'S OFFICE,
MILWAUKEE, *April* 20, 1870.

A. V. H. Carpenter, Esq., general passenger agent.

DEAR SIR: I have before me copy of a letter bearing date April 12th, inst., addressed to Brevet Major A. G. Robinson, A. Q. M. U. S. A., at St. Paul, by J. D. Bingham, brev. brig. gen. and Q. M. U. S. A., in which he states that the Commissioner of the General Land
63 Office claims that the railroad between McGregor and Calmar, Iowa, is a land-grant railroad, and refers to act of Congress of May 12th, 1864, granting land to the State of Iowa from McGregor westward; that the McGregor Western railroad, on the 30th day of August, 1864, filed a map locating said railroad from McGregor to Calmar and thence westward to O'Brien county, and that the McGregor Western Railroad Company is now known as McGregor and Sioux City Railroad Company; and also states that a certificate of the governor of Iowa had been filed showing that 120 miles of said road had been built. That the 3d section of the act of Congress provides that the lands shall be subject to the disposal of the legislature of Iowa for the purpose specified and directs that said road from McGregor to Calmar to be treated as a land-grant railroad.

The error under which Gen. Bingham labors in said communications, is in assuming that the McGregor Western Railroad Company and the McGregor and Sioux City are the same corporation. They are not the same or in way connected.

This land grant was first given to the McGregor Western Railroad Company on certain conditions, and the McGregor Western expecting to have the benefit of it, built its railroad from McGregor to Calmar, and thence to the State line of Minnesota. After it had so built its railroad and sold it to the Mil- and St. Paul Railway Company, the legislature of the State of Iowa passed an act resuming the whole of said grant, on the alleged ground that McGregor Western Company had failed to comply with the terms of said grant.

This act is chapter 16 of the Laws of 1868 of the State of Iowa and and was approved February 27th, 1868.

At the same session said legislature conferred said land grant on an entirely new company called the McGregor and Sioux City Railroad Company, and this last company has since then built the road from Calmar to Mason City, and for them Governor Merrill of Iowa made his certificate. Neither the McGregor Western or the Milwaukee and St. Paul Railway Company have ever had the benefit of a single acre of said lands, directly or indirectly, and the McGregor and Sioux City Company never had anything to
64 do with or any interest in our road from McGregor to Calmar. The act granting their lands to the McGregor and Sioux City Company is chapter 58 of the Laws of 1868, approved March 31st, 1868, and by its terms it expressly provides that the road already then built from McGregor to Calmar should not be considered as a part of the road completed or to be built with the proceeds of said lands.

The case stands thus: A grant of lands was made for a road on a certain line, to be disposed of by the legislature of Iowa. They agreed to give it to the McGregor Western Railroad Company, and on the strength of that provision the McGregor Western built the road from McGregor to Calmar, and thence to the State line. The legislature then refused to carry out its agreement, pretending that the McGregor Western had not complied with the conditions of the grant, and granted the lands to the McGregor and Sioux City Company, which last-named company is now securing said lands. The fact that our company as successors of the McGregor Western ought to have had the lands, but were refused, does not make our company a land-grant company or our road a land-grant road.

Yours, etc.,

JOHN W. CARY,
*Gen. Attorney of M. and St. P. R'y Co.*

OFFICE CHIEF QUARTERMASTER,
DEPARTMENT OF DAKOTA,
ST. PAUL, MINN., *April* 23, 1870.

Brev. Maj. Gen. M. C. Meiggs, quartermaster general U. S. A., Washington, D. C.:

GENERAL: I have the honor to present herewith a letter from John W. Cary, Esq., general attorney for the Milwaukee and St. Paul railroad in regard to the disputed piece of road between McGregor and Calmar, used by the Milwaukee and St. Paul railway.

It appears that the part in question is not a land grant; under the act cited all the land granted under the color of the statute being and having been applied to the Iowa railroad, running from Calmar to Sioux City, the grant of land beginning at Calmar.

Abundant evidence is tendered upon this subject, and the
65 railway authorities in interest desire a reconsideration and settlement of the question, having due regard to facts herewith presented

Most respectfully your obedient servant,

S. B. HOLABIRD,
*Depot Quartermaster General U. S. A., Chief Quartermaster.*

DEPARTMENT OF THE INTERIOR.
GENERAL LAND OFFICE, *June* 13, 1870.

Gen. M. C. Meiggs, quartermaster general U. S. A.:

SIR: I have received the referred letter of Gen. S. A. Holabird, deputy quartermaster general, dated April 23, 1870, St. Paul, Minnesota, respecting the portion of railroad between McGregor and Calmar, Iowa, in which there is a dispute as to whether it is a land-grant road, it being recently used by the Milwaukee and St. Paul Railway Company.

In referring to the matter I have to state, after due consideration, the opinion expressed in our communication to you of 1st of April last is reiterated, that the road from McGregor to Calmar is a land-grant road in accordance with the act of May 12, 1864. (Stats., vol. 13, p. 72.)

The papers which accompanied the referred letter are herewith returned.

Very respectfully, JOS. S. WILSON,
*Commissioner.*

WAR DEPARTMENT,
QUARTERMASTER GENERAL'S OFFICE,
WASHINGTON, D. C., *July* 7, 1870.

Hon. W. W. Belknap, Secretary of War, Washington, D. C.:

SIR: The inclosed letter from Hon. Jos. S. Wilson, Commissioner of the General Land Office, dated June 13, 1870, with accompanying papers relating to a disputed piece of railroad extending from McGregor to Calmar, in the State of Iowa, are respectfully submitted for decision as to whether the described railroad shall continue to be treated as a land-grant railroad by this department, and instructions as to what course shall be pursued in the settlement of
66 accounts for the transportation of troops and Government supplies over the said railroad, particularly in cases where the railroad company has been paid its full tariff rates and refuses to refund 33⅓ per cent. of such rates, the usual reduction from current rates for Government transportations over a land-grant railroad.

The general attorney of the Milwaukee and St. Paul Railway Company, John W. Cary, Esq., claims that the railroad between McGregor and Calmar, Iowa, is not a land-grant railroad. He says that a grant of land was made for a road on a certain line, to be disposed of by the legislature of Iowa. They agreed to give the land to the McGregor Western Railroad Company, and on the strength of that promise the McGregor Western Company built the road from McGregor to Calmar and thence to the State line.

The legislature then refused to carry out its agreement, pretending that the McGregor Western Company had not complied with the conditions of the grant, and granted the lands to the McGregor and Sioux City Company, which last-named company is now receiving said lands, and that the fact that his company, as successor to

the McGregor Western Company, ought to have had the land, but were refused, does not make that company a land-grant road.

The Commissioner of the General Land Office, under date of April 1st, 1870, in reply to a letter of inquiry from this office, states that facts relating to the case under three heads, showing that in his opinion the road from McGregor to Calmar, Iowa, is a land-grant railroad in accordance with the act of Congress of May 12th, 1864 (Statutes, vol. 13, page 72.)

A letter was written from this office to Brevet Maj. A. G. Robinson, A. J. M., dated April 12, 1870, quoting from the letter of the Commissioner of April 1st, 1870, his remarks as to the status of the disputed road and adding a paragraph from section 3rd of the act granting the lands, that the lands hereby granted shall be subject to the disposal of the legislature of Iowa for the purpose aforesaid (as provided in the 1st section of the act), and no other. Major Robinson was instructed to treat the road from McGregor to Cal-
67 mar, Iowa, as a land-grant railroad and to make the usual deduction of 33⅓ per cent. from the current rates for transportation furnished the Government.

General S. B. Holabird in his letter of April 23d, 1870, says that the railway authorities interested desire a reconsideration and settlement of the questions, having due regard to the facts presented. General Holabird's letter with inclosures was referred to the Commissioner of the General Land Office, together with additional pages relating to the subject, marked Nos. 1, 2, 3, 4, and 5, and in his reply of June 13th, 1871, the Commissioner, after due consideration, reiterates the opinion expressed in his communication to this office of April 1st, 1870, that the road from McGregor to Calmar is a land-grant road in accordance with the act of May 12th, 1864, Statutes, vol. 13, page 72.

The action of this office with regard to this question has been in conformity with the opinion of the Commissioner of the General Land Office treating the road between McGregor and Calmar as a land grant railroad.

The Milwaukee and St. Paul Railway Co., who controls this road, has been requested to refund 33⅓ per cent. of the current rate in cases where they have been paid the full rate for the transportation of troops and the requests have not been complied with, the refusal to refund being based on their claim that the road from McGregor to Calmar, Iowa, is not a land-grant railroad.

The accompanying papers referred for reference are designated as follows, viz: "A," letter from General Holabird, submitting a letter from the attorney of the Milwaukee and St. Paul Railway Co. "B," letter from the attorney of M. & St. P. R. R. Co. "C," ext. copy letter of instructions from this office to Brevet Maj. A. G. Robinson, A. J. M. "A A," letter from Hon. Jos. S. Wilson, Com. etc. "B B," off. copy of Com.'s letter April 1, 1870; No. 1, off. copy, letter to att'y gen'l of Iowa; No. 2, off. copy of att'y gen'l's reply to No. 1; No. 3, off. copy act of leg. Iowa, relating to public lands granted by act of Congress May 12, 1864; No. 4, off. copy of sec'y of state Iowa, transmitting a release of public lands issuing to the Mc-

Gregor Western R. R. Co. by virtue of act of Congress dated
68 May 12, 1864; No. 5, off. copy of release referred to under No. 4.

Very respectfully, your obedient servant,

M. C. MEIGGS,
*Quartermaster General, Brevet Maj. General U. S. A.*

Ten enclosures—Bk. 72, letter H, 885; Bk. 73, letter W, 174; W. D. Bk. 13; B. H. L. 72.

WAR DEPARTMENT, *July* 12, 1870.

Hon. Attorney General.

SIR: I have the honor to enclose herewith certain papers exhibiting the unsuccessful efforts of the quartermaster department to recover from the Milwaukee and St. Paul Railroad Company one-third of the rates paid by said department for public transportation over that portion of the company's line extending from McGregor to Calmar, in the State of Iowa, upon the ground that such portion is a land-grant railroad, and to recommend in the event of your concurrence in the opinion of the Commissioner of the General Land Office that suitable measures be taken to compel the company to refund the same erroneously paid to them.

Very respectfully, etc.,

W. W. B.,
*Secretary of War.*

QUARTERMASTER GENERAL'S OFFICE,
WASHINGTON, D. C., *Feb.* 6, 1868.

Hon. Joseph S. Wilson, Commissioner General Land Office, Washington, D. C.

SIR: Enclosed is a copy of a letter of S. S. Merrill, Esq., general manager Milwaukee and St. Paul Railroad, relative to the lands granted by Congress to the Minnesota Central and McGregor Western railroads, both of which are now part of the Milwaukee and St. Paul railroad.

It is stated by Mr. Merrill that only 138 miles between McGregor and Mendota can be claimed as land-grant road, to wit: From Austin to Mendota, 95 miles, and from McGregor to Calmar 43
69 miles, and that the balance of the McGregor road was not built on the land-grant line, nor has the company received any portion of the grant for the 43 miles already built.

There are no data in this office for verifying these statements, and in order properly to adjust the accounts of the railroad company for the transportation of U. S. troops and supplies, it is essential that the relations respecting land grants existing between the United States and the above-named railroads should be authoritatively ascertained.

I have the honor to request, therefore, that this office be furnished with such information as will lead to a correct understanding of the matter.

In this connection it is respectfully requested that a copy of the latest map constructed in your office exhibiting the railroads of the

country to which public lands have been granted, and the amount of such lands, be furnished for this office.

Respectfully your obedient servant,

(Signed) D. H. RUCKER,
*Acting Quartermaster General, Bvt. Major General, U. S. A.*

W. D. Bk. 8, M. 50.

DEPARTMENT OF THE INTERIOR,
GENRAL LAND OFFICE, *February* 15, 1868.

General Daniel H. Rucker, acting quartermaster general, U. S. A.:

SIR: I have received your letter of the 6th inst. accompanied by copy of one herewith of the 25th ult. from S. S. Merrill, Esq., of Milwaukee, Wis., to deputy quartermaster general at Chicago, wherein you request to be furnished with information as to what portion of the Minnesota Central and McGregor Western are considered land-grant railroads under their respective grants.

In answer I have the honor to transmit herewith, connected maps of the States of Minnesota and Iowa, showing the line of route of the different railroads, as well as the roads in question, which under the act of Congress approved March 3d, 1857, lands are granted to the State of Minnesota to aid the Minnesota Central from
70 Minneapolis to the State line, making about 100 miles, and under the act of March 3d, 1865, land is granted to aid the same road from a point about six miles south of Mendota to the State line.

By the act of May 12, 1864, lands are granted to the State of Iowa to aid the McGregor Western railroad from McGregor to Calmar, which is 3 miles; thence running westward to connect with the Sioux City and St. Paul railroad. I have to state that no provision is made in the statute to grant lands for the portion of the road running from the town of Calmar to the State line, to connect with the Minnesota Central.

For the information of your office I take pleasure in transmitting a connected map of the United States and territories, with all the railroad lines marked thereon to which lands have been granted.

Respectfully your obedient servant,

JOS. S. WILSON.

MILWAUKEE AND ST. PAUL RAILWAY,
GENERAL ATTORNEY'S OFFICE,
MILWAUKEE, *Dec.* 28, 1869.

A. V. H. Carpenter, Esq.:

DEAR SIR: The communication of Mark Stevenson to you concerning the claim of Bvt. Brig. Gen. J. D. Bingham, Q. M., dated December 15, 1869, claiming the sum of $640.00 an overcharge for transporting soldiers from McGregor to St. Paul, over the Milwaukee and St. Paul railway, on the ground that said railway is a land-grant railroad, is before me and contents noted.

The Milwaukee and St. Paul railway from Mendota to Austin, in

the State of Minnesota, is a land-grant road, and subject to the law applicable to such roads.

The road in Iowa, or from McGregor to Austin, is not a land-grant road, and has never received any lands or benefit from any land grant, and is not subject to any deductions on that account.

The act of May 12, 1864, granted land to the State of Iowa for the McGregor Western Railroad Company. The State afterwards passed an act granting said land to the McGregor Western
71 Company, and in expectation of receiving said lands, the company built about sixty miles of railroad, but never received any lands; and in 1868, the legislature of Iowa passed a law resuming the grant, and then granted the same to the McGregor and Sioux City Railway Company, which is engaged in building a road from Calmar to Yankton.

No part of the line to St. Paul in the State of Iowa is therefore subject to deduction on account of land grant.

Respectfully, etc., JOHN W. CARY,
*General Attorney M. and St. Paul R'y Co.*

QUARTERMASTER GENERAL'S OFFICE,
WASHINGTON, D. C., *February* 2, 1870.

Brevt. Brig. Gen. J. D. Bingham, chief quartermaster department of the lakes, Detroit, Mich.:

GENERAL: In reply to the communication of John W. Cary, Esq., general attorney Milwaukee and St. Paul Railway Company, addressed to Mr. A. V. H. Carpenter, under date of December 20, 1869, and forwarded by you to this office January 20, 1870, stating that no part of the McGregor Western railroad is land grant,, I enclose copy of letter to this office dated February 15, 1868, from Hon. Jos. S. Wilson, Commissioner General Land Office, stating: "By the act of May 12, 1864, lands are granted to the State of Iowa to aid the McGregor Western railroad from McGregor to Calmar, which is 43 miles," etc.

I also enclose extract copy of letter from Brevt. Maj. A. G. Robinson, A. Q. M., St. Paul, Minn., dated December 24, 1869, stating: "The portion of railroad lines between St. Paul and Chicago, via Milwaukee, which, according to information received from your office, is land grant, lays between St. Paul and McGregor, viz:

"McGregor to Calmar, 43 miles, and St. Paul to State line, (Le Roy), 12 miles; total 170 miles. Distance from St. Paul to McGregor, 212 miles; fare, $9; proportion of fare over land-grant part, $7.21; 33⅓ per cent. deduction, $2.40, (instead of $3), the company is willing to refund." * * *

72 Presuming that this information will be a sufficient reply, I am, General, very respectfully your obedient servant,

J. C. McFERRAN,
*Deputy Q. M. General, Acting*
*Quartermaster General U. S. A.*

General ticket office Cincinnati, Hamilton and Dayton, and Dayton and Michigan, and Cincinnati and Richmond and Chicago railroads.

CINCINNATI, O., *February* 26, 1870.

J. D. Bingham, Brevt. Brig. Gen. and Q. M., Detroit, Mich.:

DEAR SIR: Upon receipt of yours of the 8th inst., relative to amount still due on vouchers paid these companies on account of land grant to the Milwaukee and St. Paul Railway Company, I wrote to the officials of that road and submit herewith the response received from them.

Truly yours, SAM'L STEVENSON,
*General Ticket Agent.*

MILWAUKEE, WIS., *February* 24, 1870.

Sam'l Stevenson, Esq., G. T. A., Cin., Ham. and Dey. R. R., Cincinnati, O.:

DEAR SIR: "Your favor inclosing letter and statement from Brig. Gen. J. D. Bingham, Q. M., Detroit, received. As to the claims for land grant between the stations of Austin and Le Roy, I have to say that the matter has been submitted to our general attorney, and he says the only land grant that the soldiers passed over on our railway was from Austin to St. Paul. Our land grant was on the old Minnesota Central railway from St. Paul to the State line, 'but that State line' runs from Austin west of our through line to the State line, twelve miles, which was specified in the grant, and has been built and is now in operation, but is no part of the through line between McGregor and St. Paul, but, as I said, is operated as a branch to conform to the grant, but is not used as a part of the through line at all; so we have given to the Government all that can be claimed as land grant.

Yours respectfully, J. P. WHALING, *Auditor.*

73 HEADQUARTERS DEPARTMENT OF THE LAKES,
CHIEF QUARTERMASTER'S OFFICE,
DETROIT, MICHIGAN, *March* 1, 1870.

Bvt. Maj. Gen. M. C. Meiggs, quartermaster general, U. S. A., Washington, D. C.

GENERAL: In accordance with your instructions of February 2, 1870, I called upon the Milwaukee and St. Paul Railway Company to refund $80.41, being amount which should have been deducted for land grant on that portion of the road from Austin to Le Roy. I enclose herewith a reply received from the auditor of the road, in which he states that the portion from Austin to Le Roy is not land grant.

If this reply is not correct, I respectfully request that steps be taken to collect the amount, $80.41, from my accounts that are now or may become due the road.

I am, General, very respectfully, your obedient servant,

J. D. BINGHAM,
*Bvt. Brig. Gen. and Q. M., U. S. A.*

STATE OF IOWA,
OFFICE OF SECRETARY OF STATE,
DES MOINES, *March* 25, 1870.

[The Great Seal of the State of Iowa.]

General J. D. Bingham, chief quartermaster department of lakes, Detroit, Michigan.

SIR: Pursuant to your request of March 22d, I have the honor to state that the McGregor Western Railway Company did on the 28th day of April, 1868, execute a release of all lands inuring to said company by virtue of an act of Congress, approved May 12, 1864, said release being for the benefit of the McGregor and Sioux City Railway Company, a copy of which is herewith transmitted.

Yours truly,
ED. WRIGHT,
*Secretary of State.*

74 QUARTERMASTER GENERAL'S OFFICE,
WASHINGTON, D. C., *Nov.* 14, 1870.

Hon. W. W. Belknap, Secretary of War.

SIR: I have the honor to enclose copy of a communication addressed to the Secretary of War, from this office on July 7th, 1870, requesting a decision whether the line of railroad from McGregor to Calmar, Iowa, should continue to be considered a land-grant railroad by this department.

The Secretary of War forwarded the papers in the case to the Attorney General for his action.

It is recommended that the attention of the Attorney General's office be invited to this case, as inquiries from interested railroad companies are repeated and await a decision.

Very respectfully your obedient servant,
M. C. MEIGGS,
*Quartermaster General, Bvt. Maj. Gen., U. S. A.*

W. D. Bk. 14 W. 553.
W. D. Bk. 11 W. 206.
1 enclosure.

WAR DEPARTMENT, *Nov.* 18, 1870.

Hon. Attorney General.

SIR:—I have the honor to recall to your attention the letter of the quartermaster general, of the 7th July last, which was submitted to you by this department for your opinion on the question whether the railroad extending from McGregor to Calmar, Iowa, is to be regarded as a land-grant road. A copy of the letter is enclosed.

Very respectfully, &c.,
W. W. B.,
*Secretary of War.*

DEPUTY QUARTERMASTER GENERAL'S OFFICE,
ST. PAUL, MINN., *May* 9, 1871.

Col. D. H. Rucker, chief quartermaster mil. div. Mo., Chicago, Ill.

COLONEL:—I have the honor to report that certain boxes and

chests, etc., shipped April 27th from Sioux City, Ia., by
75 Capt. J. V. Furey, A. Q. M. U. S. A., via Cedar Falls and Mona, Iowa, are held by the Milwaukee and St. Paul Ry. Co., in this city, the agent refusing to deliver, subject to any deduction from tariff rates on acct. passing over land-grant roads. The amount of bill as charged amounts to $11.84, and I respectfully ask for instructions in regard to this matter.

Very respectfully, your obedient servant,

S. B. HOLABIRD,
*Deputy Q. M. General U. S. A.*

Respectfully forwarded to the quartermaster general. I also transmit herewith a communication from Col. Holabird to this office of 6th inst., reporting that there is now (then) lying in the Milwaukee and St. Paul railway station some public harness, saddles, etc., consigned to him from this place, with the freight made payable at St. Paul, which property the R. R. Co. will not deliver to him before full payment of charges without land-grant deductions, etc., etc.

The small lot of stores referred to in Col. Holabird's letter of 6th inst., was forwarded by the all-rail route to St. Paul, because it was not certain that at the time (April 20) river navigation was open, and besides no such difficulty as the one in question was thought of, my personal attention never having been, before the receipt of Col. Holabird's letter, called to the practice of the Milwaukee and St. Paul railroad of retaining public stores until these charges were paid.

I suggested to Col. Holabird, in reply to his letter of 6th inst., to secure possession of the Government property in the hands of the R. R. Co. by endorsing the bill of lading payable at this office, and telling him that I hoped, if this course fails, he would be able to make some other arrangement with the company to get possession of the property. I also told him that not a pound of public stores will hereafter be sent over the Milwaukee and St. Paul railroad from this direction if it can possibly be avoided.

In case I do have to send any freight to St. Paul over that line, the b. l. will be made payable here. Since the 20th of April
76 all the public stores that have been sent to St. Paul from Chicago have been shipped by the part rail and part river route, which is, of course, the cheapest, and which is always used when navigation on the upper Mississippi is open.

I respectfully request early instructions from the quartermaster general as to the course to be pursued by Col. Holabird in the case within referred to.

D. H. RUCKER,
*Asst. Quartermaster General U. S. A., Chief Q. M. D. Mo.*

Second endorsement.

QUARTERMASTER GENERAL'S OFFICE,
WASHINGTON, D. C., *May* 15, 1871.

Respectfully forwarded to the honorable the Secretary of War, and attention invited to the foregoing reports showing the embarrassments under which the Q. M. dept. is laboring at St. Paul, Minn., growing out of the question whether or not the Milwaukee and St. Paul R. R. is a land-grant road, which question was submitted by the Secretary of War to the Attorney General July 12, 1870.

On Nov. 18, 1870, the Secretary of War called the attention of the Attorney General to the case.

No reply is known to have been made yet by the Hon. Attorney General, and in view of the recent action of the company at St. Paul, it is recommended that the Attorney General be specially requested to act upon the matter.

It is respectfully requested that these papers be returned.

M. C. MEIGGS,
*Quartermaster General, Bvt. Maj. Gen. U. S. A.*

MILWAUKEE AND ST. PAUL RAILWAY,
GENERAL FREIGHT AGENT'S OFFICE,
MILWAUKEE, *June*, 1871.

R. H. Magee, agent, St. Paul:

DEAR SIR: Your favor of the 31st ultimo, covering certain papers relating to collection of charges by you on Government freight, and certain deductions made from such charges on account of land-grant roads, is at hand. I will make a voucher
77 in your favor for the deficit due you upon account of such deductions, but as our line west of McGregor to and including Calmar, is not a land-grant line, or a portion thereof, I must charge you to allow no further deductions to be made upon such account. This matter has been overhauled several times, and each time we have been able to convince the A. M. Q., most interested, of the justice of our position. I would be glad if you will have an understanding with General Holabird to avoid future complications. You may use the enclosed duplicate of letter from our general attorney for this purpose, and then place it on file in your office.

Yours truly, O. E. BRITT, *G. F. Ag't.*

DEPUTY Q. M. GENERAL'S OFFICE,
ST. PAUL, MINN., *June* 19, 1871.

To the quartermaster general U. S. A., Washington, D. C. (through office chief Q. M. mil. div. Mo.)

SIR: I have the honor herewith to submit copies of papers this day laid before me by Mr. R. H. Magee, agent of the Mil. and St. Paul R'y Co. at St. Paul, and which relate to the subject of deductions for land grant from McGregor to Calmar, Iowa, 43 miles. As seen by the letter of instructions to Mr. Magee, no more Government

freight will be delivered subject to such deduction, and I respectfully ask for instructions in regard to the matter.

Very respectfully your obedient servant,

S. B. HOLABIRD,
*Deputy Q. M. Gen. U. S. A.*

DEPARTMENT OF JUSTICE,
WASHINGTON, *June* 19, 1871.

Hon. W. W. Belknap, Secretary of War.

SIR: I have considered the question submitted to the Attorney General in your letter of July 12, 1870, and May 18, 1871, as to whether the railroad between the towns McGregor and Calmar, which forms a part of the line of the Milwaukee and St. Paul
78 Railway Company, is or is not a land-grant road. This question, it seems, has arisen in connection with certain transportation performed by that company for the quartermaster's department over the railroad mentioned, the officers of the department claiming the usual abatement of 33⅓ per cent. from the regular rates in respect of such transportation, on the ground that said road is, as they assume, a land-grant road; while the agents of the company deny that the road is a land-grant road, and decline to allow the abatement claimed. From the papers submitted with your letters, and from other sources of information within immediate reach, I gather the following facts:

By act of Congress of May 12, 1864, (13 Stat., 72,) a grant of public lands was made to the State of Iowa, "for the use and benefit of the McGregor Western Railroad Company, for the purpose of aiding in the construction of a railroad" from McGregor, in that State, westward by the most practicable route, on or near the forty-third parallel, until it should intersect a railroad projected from Sioux City to the Minnesota State line.

The fourth section of the act contains a proviso to the effect that if the said company, or its assigns, shall fail to complete at least twenty miles of its road during each and every year from the date of its acceptance of the grant, and so dispose of the same as to secure the completion of a road on said line, etc.

The grant was accepted on the part of the State, by an act of the legislature thereof dated April 20, 1866, upon the terms, conditions and restrictions imposed by Congress.

On the 27th of February, 1868, the State legislature passed an act entitled "An act to resume all the lands and rights conferred upon the McGregor Western Railroad Company by or under an act of Congress, approved May 12, A. D. 1864." This act, (after reciting, in a preamble, the grant to the State hereinbefore mentioned, the proviso in the fourth section of the act of Congress, to which reference is above made, and also declaring that said company has wholly failed to build said railroad as therein required, and to perform the conditions of said grant, and has forfeited all right to the benefits of said grant), enacts: "That all lands and all rights to said

lands granted or intended to be granted to the McGregor
79 Western Railroad Company by said act be and the same are hereby absolutely and entirely resumed by the State of Iowa, and that the same be and are as fully and absolutely vested in said State as if the same had never been granted to said railroad company."

And shortly afterwards, namely, on the 31st of March, 1868, the same legislature passed an act making a new disposition of the grants, conferring it upon another company called the McGregor and Sioux City Railway Company. This act provides: "That all the lands, rights and privileges that are granted to the State of Iowa by an act of Congress, approved May 12, 1864, for the purpose of aiding in the construction of a railroad from, etc., until it shall intersect the proposed railroad running from Sioux City to the Minnesota State line, etc., are hereby granted and conferred to and upon the McGregor and Sioux City Railway Company." The act furthermore provides that this is made upon the following, among other, conditions, viz: "The said railway company shall have constructed and in running order a line of railway as required by the provisions of the act of Congress making said grant to the State, and of this act," etc. It also contains a provision that "this act shall not be so construcfed as to grant to said railway company, or any person or persons whomsoever, any of said lands for any railroad heretofore built." And it requires, as a further condition of the grant, that the said railway company shall procure and file with the secretary of state (of Iowa) a full, absolute, legal and effectual waiver, release and surrender of all claims, right or interest, or pretended claim, right, or interest of the McGregor Western Railroad Company, its successors or assigns, into any of the lands granted to this State by act of Congress, approved May 12, A. D. 1864, which claim, right or interest arises out of or is on account of any railroad already constructed."

On the 28th of April, 1868, the board of directors of the McGregor Western Railroad Company adopted a resolution authorizing certain officers of that company "to make, execute and deliver to the McGregor and Sioux City Railway Company a full, absolute, legal and effectual waiver, release and surrender of all claims, right or
80 interest, or pretended claim, right or interest," as aforesaid, and thereupon the officers of the former company referred to, executed an instrument containing a full, absolute, legal and effectual waiver, release and surrender of all said claims as above described to the McGregor and Sioux City Railway Company, which was filed by the latter company in accordance with the requirement of the act of the State legislature already mentioned. I may observe here that the McGregor and Sioux City Railroad Company has since changed its name to the McGregor and Missouri River Railway Company, and is at present known by the latter designation.

The act of Congress making the grant to the State of Iowa, provides (see 4th section) that when the governor of that State shall certify to the Secretary of the Interior that any section of ten consecutive miles of road is completed in a good, substantial and work-

manlike manner as a first-class railroad, then the Secretary shall issue to the State patents for one hundred sections of land for the benefit of the road having completed the ten consecutive miles; and so on for each additional section of ten consecutive miles, until the entire road is completed. It appears that on the 5th of December, 1870, the governor certified to the Secretary that certain maps, annexed to his certificate "constitute a correct delineation of the completed part of the railroad contemplated in said act of Congress, etc.; that said road is built in a good, substantial, workmanlike manner, etc.; and said road is completed to Algona, in Kossuth county, a distance of 180 $\frac{2}{100}$ miles by the line of said road from the city of McGregor." The maps mentioned describe the road thus completed as that of the McGregor and Missouri River Railroad Company, formerly called the McGregor and Sioux City Railway Company, and they include as part thereof, the road from McGregor to Calmar.

Besides the certificate of the governor, there is also filed with the Secretary an affidavit purporting to have been given by the president of the McGregor and Missouri Railway Company on the 30th of December, 1869, stating that "their road is completed and equipped from the city of McGregor to the village of Mason City," etc.

81 Now, I find it stated in the papers submitted, that before the resumption of the land grant by the State of Iowa, as aforesaid, from the McGregor Western Railroad Company, this company had already built the road undertaken thereby from McGregor as far as Calmar, and sold it to the Milwaukee and St. Paul Railway Company, by which it is understood to be still owned and managed, forming a part of the line or route of the latter company between St. Paul and Milwaukee; that neither of those companies has ever had the benefit of the grant mentioned directly or indirectly; and that the McGregor and Sioux City Railway Company, now called the McGregor and Missouri River Railway Company, never had anything to do with or any interest in the road from McGregor to Calmar. This road, as it would seem, is not locally distinct from the road between those points, which is described on the aforesaid maps as forming a part of the completed portion of the McGregor and Missouri River Railway Company.

Taking the foregoing to present a correct statement of all the material facts of the case, I incline to the view that the railroad between McGregor and Calmar, Iowa, forming part of the line of the Milwaukee and St. Paul Railway Company, is not a land-grant road.

In arriving at this conclusion, I assume that the act of the Iowa legislature resuming the grant from the McGregor Western Railway Company after it had completed its road to Calmar, was valid and effectual for that purpose, but that it effected nothing beyond the mere exclusion of the benefit of the grant, leaving the company in the enjoyment of its franchise, and it or its assignee in the possession and ownership of the road as before. If this is so, and neither that company nor its as-ignee afterwards became entitled to participate in the benefits of the grant with respect to this piece of road, I am

unable to perceive in what way the same can be regarded as a land-grant road. There is nothing in the subsequent action of the State of Iowa, or of the McGregor Western Railroad Company, so far as I can discover, which shows that the latter or its assignee ever became so entitled.

82 The State legislature, after resuming the grant as aforesaid, conferred it upon the McGregor and Sioux City Railway Company, but in doing so expressly excluded therefrom "any railroad theretofore built," which necessarily cut out the road in question. Not only this, but in the act conferring the grant upon the last-mentioned company the precaution was taken to require it to file, as one of the conditions upon which the grant was conferred, "a full, absolute, legal and effectual waiver, release and surrender of all claim, right or interest, or pretended claim, right or interest of the former company in or to any of the lands granted by Congress," which claim, right or interest arises out of or is on account of any railroad already constructed, so that neither of these companies could, by the terms or under the operation of this act, claim any benefit from the grant in respect of the road then already built, which, as it appears, included the road between McGregor and Calmar.

Much of the difficulty surrounding the subject under consideration has, perhaps, grown out of the fact that the railroad between McGregor and Calmar is on the line of the route mentioned in the act of Congress cited above; that it is described as forming part of the road of the McGregor and Missouri River Railway Company on certain maps, which, the governor of Iowa certifies, "constitute a correct delineation of the completed part of the railroad contemplated in said act of Congress," and that the president of the McGregor and Missouri River Railway Company has made an affidavit in which he states that their road is completed and equipped from the city of McGregor to the village of Mason City, which is a point westward of Calmar.

Were this a case between that company and the Government, there might be some foundation here for a different view from that above expressed. But as the matter now stands, in the light of the information before me, I see no escape from the conclusion already indicated.

Very respectfully, B. H. BRISTOW,
*Solicitor General and Acting Attorney General.*

83 At a meeting of the directors of the McGregor Western Railway Company, held April 28, 1868. Present—Cowdrey, Buell, Bohee, Hubbard, Scott, Johnson, Whaling and Cary. Absent—Green.

The following proceedings were had. On motion of Mr. Buell, the following resolution was unanimously adopted.

Resolved, That the president or vice-president, with the secretary or assistant secretary, be and they are hereby authorized to make, execute and deliver to the McGregor and Sioux City Railway Company full, absolute, legal and effectual waiver, release and surrender

of all claim, right or interest or pretended claim, right or interest of this company, its successors or assigns, in or to any of the lands granted to the State of Iowa by act of Congress, approved May 12, 1864, which claim, right or interest arises out of or is on account of any railroad already constructed.

In pursuance of the authority conferred by the foregoing resolution and the requirements of the statute of the State of Iowa, enacted by the legislature of said State at its session in 1868, entitled, "An act making a grant of land to the McGregor and Sioux City Railroad Company, etc."

The McGregor Western Railway Company hereby transfers and assigns to the McGregor Railway Company, its successors and assigns all and any claim, right or interest of said McGregor Western Railway Company, its successors and assigns, in or to any of the lands granted to the State of Iowa, by act of Congress, approved May 12, 1864, which claim, right or interest arisen out of or is on account of any railroad already constructed, and hereby makes a full, absolute, legal and effectual waiver, release and surrender of all said claims, as above described to the McGregor and Sioux City Railway Company.

In witness whereof the said McGregor Western Railway Company has caused their name to be signed hereto by their vice-presi-
84 dent and assistant secretary and their corporate seal attached hereto

McGREGOR WESTERN RAILWAY COMPANY.
N. H. COWDREY, *Vice-Prest.*
J. M. BOHEE, *Ass't Secy.*

## CHAPTER 58.

*Lands Granted to the McGregor and Sioux City Railway Company.*

An act making a grant of land to the McGregor and Sioux City Railway Company, in case of their failure to accept the same, to the Forty-third Parallel Company, and to execute the trust conferred by act of Congress, entitled: "An act for a grant of land to the State of Iowa, in alternate sections, in the construction of a railroad in said State," approved May 12, 1864.

SEC. 1. Be it enacted by the General Assembly of the State of Iowa that all the lands, rights and privileges that are granted to the State of Iowa by an act of Congress, approved May 12, 1864, for the purpose of aiding in the construction of a railroad from a point at or near the foot of Main street, South McGregor, in said State, in a westerly direction, by the most practicable route, at or near the forty-third parallel of north latitude, until it shall intersect the proposed railroad running from Sioux City to the Minnesota State line, in the county of O'Brien, in said State of Iowa, are hereby granted and conferred to and upon the McGregor and Sioux City Railway Company, a corporation organized under the laws of the State of Iowa.

Provided, said railroad company accepting the provisions of this

act shall at all times be subject to such rules, regulations and rates of tariff for the transportation of freights and passengers as may from time to time be enacted and provided for by the General Assembly of the State of Iowa, and further subject to the conditions, limitations, restrictions and provisions contained in this act, and in the acts of Congress granting said lands to the State of Iowa.

85 SEC. 2. This grant is made upon the express condition that said railway company shall have constructed and in running order a line of railway as required by the provisions of the act of Congress making said grant to the State, and of this act, upon the most practicable route, on or near as practicable to the forty-third parallel of north latitude, running within one mile of New Hampton, in Chickasaw county, and running thence by way of and within one mile of St. Charles city, Mason city and Algona, until it shall intersect in the county of O'Brien, in this State, the proposed railroad running from Sioux City to the Minnesota State line.

SEC. 3. This grant is conferred to the McGregor and Sioux City Railway Company on the further express conditions that in case said company shall fail to have its railway built and completed in good running order as far west as to Chickasaw, in range fourteen, in Chickasaw county, by the first day of September, 1869, or in case said company shall fail to build and complete in good running order at least twenty miles in addition in each and every year thereafter, and the whole of said road by the first day of December, 1875, then in case of any such failure, or on failure to comply with any of the conditions of this act, the State of Iowa may at any time resume all rights conferred by this act, and resume all rights to the lands hereby granted, and which may remain undisposed of to said company on account of road actually built in compliance with the terms of this act, provided, that if in any one year more road shall be built than is required by this act it shall be regarded and treated as road built in the next succeeding year or years.

SEC. 4. This railway shall be constructed upon the usual gauge of other first-class railroads in this State, and shall be constructed and finished in a style and of quality equal to the average of other first-class western railroads.

SEC. 5. The said company shall be entitled to the benefit of the selections of land already made under the grant to the State of Iowa of lands to aid in the construction of a railroad from McGregor westward on or near the forty-third parallel, approved May

86 12, 18-4, and the line located under said grant shall be binding only so far as applicable to said selections.

SEC. 6. It is hereby made the duty of the governor when ten consecutive miles of railroad have been built in accordance with the provisions of this act, to certify that fact to the Secretary of the Interior, and so for each consecutive ten miles thereof, as the same shall be completed, and whenever the said McGregor and Sioux City Railway Company shall have completed in good, running order, according to the provisions of this act, its railway to a point within one mile of St. Charles City, in Floyd county, it shall be the duty of the governor of this State to cause patents to be issued to

said railway company for one hundred and fifty sections of said lands, and when the said railway company shall in like manner have completed its railway to the east line of range twenty-two, in Cerro Gordo county, then the said governor shall cause patents to be issued to the said railway company for one hundred and fifty sections of land, and when the said railway company shall in like manner have completed its railway to a point within one mile of Algona, in Kossuth county, then the governor shall cause patents to be issued to said company for one hundred and fifty sections more of said lands, and when the said railway company shall in like manner have completed its railway to the Little Sioux river then the said governor shall cause patents to be issued to said company for all the balance of the lands granted for that purpose; provided, that the said railway company shall not convey or encumber any of said lands prior to the time it shall be entitled to patents therefor as provided in this act, and this act shall not be so construed as to grant to said railway company, or any person or persons whomsoever, any of said lands for any railroad heretofore built.

SEC. 7. All lands embraced in said grant which were entered prior to January 1, 1866, under the homestead laws of the United States, shall be patented by the governor of this State to the parties by whom the same were so entered, or to their heirs or grantees upon the payment by them into the State treasury, within two years from the passage of this act, of the price of such lands as home-
87 steads under the laws of the United States; and the money so paid for such lands shall be held for and paid over to said railway company when such lands would have been earned by said company by the extension of said road as required in this act.

SEC. 8. It is further expressly provided that if said McGregor and Sioux City Railway Company shall fail or refuse to accept of this grant upon the conditions hereby imposed and in time and manner as herein required, the Forty-third Parallel Railway Company may accept the grant within sixty days thereafter, and shall thereby become substituted to all the rights and subject to all the conditions hereinbefore mentioned to the same extent as if said Forty-third Parallel Railway Company had been mentioned in this act in the place of the McGregor and Sioux City Railway Company, wherever the same occurs.

SEC. 9. The said McGregor and Sioux City Railway Company shall assent to and accept the provisions of this act by a written instrument under the seal of such corporation, with the signatures of the proper officers, within sixty days after the passage of this act which said acceptance shall be filed in the office of the secretary of state, and be by him recorded in the book by him kept for the recording of articles of association.

And, as a further condition of this grant, and at the time of the acceptance hereinbefore required and as a part thereof, the said McGregor and Sioux City Railway Company shall procure and file with the said secretary of state a full, absolute, legal, and effectual waiver, release and surrender of all claim, right or interest, or pretended claim, right or interest of the McGregor Western Railway

Company, its successors or assigns, in or to any of the lands granted to this State by act of Congress, approved May 12, A. D. 1864, which claim, right, or interest arises out of or is on account of any railroad already constructed.

Provided, That if the Congress of the United States shall make any additional grant of land to the State of Iowa to aid in the construction of a railroad from McGregor or any intermediate
88 point to a point in O'Brien county, and the said McGregor and Sioux City Railway Company, their successors or assigns, shall comply with all the provisions of this act, and shall construct their railroad to O'Brien county, in the manner and time as provided in this act, then this release shall not operate to deprive said last-named company, their successors or assigns, of land in said contemplated additional grant for any railroad constructed on said line between McGregor and O'Brien county.

SEC. 10. This act, being deemed of immediate importance, shall take effect and be in force from and after its publication in the Daily State Register and Iowa Evening Statesman. Approved March 31, 1868.

I hereby certify that the foregoing act was published in the Iowa Evening Statesman, April 2, 1868, and in the Daily State Register, April 3, 1868.

ED. WRIGHT,
*Secretary of State.*

To all of which letters, and each of them separately, plaintiff objects as incompetent, immaterial, and irrelevant.

Plaintiff further objects that it does not appear that any of the lands in controversy are coterminous with the portion of the road to which the letters in question relate.

It does not appear that any of the lands in controversy have been patented to or received by the railroad company in question on account of the construction of that portion of the road between McGregor and Calmar.

It affirmatively appears that the lands in controversy are not coterminous with that portion of the road.

The appropriate evidence of the construction of the whole line of road as a land-grant road is the certificate from the governor of Iowa to the Secretary of the Interior, which have been offered and received in evidence in this case and are not open to contradiction by the defendant in this case.

That if any portion of the line of road after being constructed as a land-grant road, as shown by the certificate of the governor of Iowa to the Secretary of the Interior, was not operated as a
89 land-grant road, the remedy of the United States was by receiving from the company any overcharge it may have made in carrying freight or other transportation facilities afforded to the Government, and would not effect the title to the land.

Defendant has shown no interest in the land in controversy, and has no right to call in question the validity of the patents and other evidence of title offered by plaintiff.

That the operation of the line as a land-grant road was a matter wholly between the United States and the company, and not between the company and the defendant.

Objection overruled.

Plaintiff excepts.

Defendant next offers in evidence a map showing the line of construction of the Chicago, Milwaukee and St. Paul Railroad Company, where it passes through O'Brien county, Iowa, which map is shown to be a correct copy and tracing of a map filed in the office of the Commissioner of the General Land Office at Washington, D. C. The original of which was prepared by the Chicago, Milwaukee and St. Paul Railroad Company, duly certified by the Commissioner of the General Land Office, under date of April, 1886, and the same is marked Defendant's Exhibit (2). See page 148 of Transcript.

The map being, from its nature and extent, incapable of introduction in this abstract, but is attached to transcript and certificate thereto, is as follows:

DEFENDANT'S EXHIBIT "2."

APRIL, 1886.

I, Wm. A. J. Sparks, Commissioner of the General Land Office, hereby certify that the annexed tracing is a true and correct copy of the map filed in this office October 11, 1879, by the Chicago, Milwaukee and St. Paul Railway Company as map of its road as constructed from Algona to Sheldon in the State of Iowa. In testimony, etc.

Defendant objects as incompetent, irrelevant and immaterial, and that it relates to a matter with which the defendant has no concern.

90 Objection overruled.

Plaintiff excepts.

Defendant next offers in evidence the map of definite location of the McGregor and Western railroad in O'Brien county, Iowa, the original of which was filed in the office of the Commissioner of the General Land Office, Washington, D. C., August 30, 1864, showing the line of definite location of the McGregor and Western railroad, and marks the same Defendant's Exhibit "3."

The COURT: Is there any objection to that, Mr. Monk?

Mr. MONK: What, the map of 1864?

The COURT: Yes.

Mr. MONK: No, sir; I have no objection.

Said map, from its nature and extent, cannot be produced in this abstract, but the same is attached to transcript, (see page 149 of Trans.) and certificate thereto is as follows:

DEFENDANT'S EXHIBIT "3."

OCTOBER 6, 1887.

I, Wm. A. J. Sparks, Commissioner of the General Land Office, hereby certify that the annexed tracings of a portion of the map filed in this office August 30, 1864, purporting to show the line of the McGregor and Western railroad under construction from McGregor to Calmar, and the proposed line of the McGregor and Western railway through the counties of Winneshief, Chickasaw, Floyd, Cerro Gordo, Hancock, Kossuth, Palo Alto, Clay and O'Brien, in the State of Iowa, and copy of the certificate attached thereto, — true and literal exemplifications from the files in this office.

F. N. DERBY, called as a witness on the part of the defendant, states as follows:

I am the treasurer of O'Brien county; have been treasurer a little over four years; was not engaged in the treasurer's office prior to that time.

Q. You may state whether the Chicago, Milwaukee and St. Paul Railroad Company paid any taxes on the northeast quarter of section 1, township 95, range 41, O'Brien county, Iowa, during the years 1878, 1879, 1880, 1881 and 1882?

91 Objected to as irrelevant and immaterial.

The COURT: What do you seek to prove by that, Mr. Hughes?

Mr. HUGHES: The issues presented that they denied the lands were theirs and refused to pay the taxes on them, and that relying on their conduct and their acts in this particular and others, and the authority of the Secretary of the Interior, the defendant went upon the premises, made valuable improvements. It is on that theory of course that this evidence is offered.

The COURT: Well, it won't do any hurt if it don't do any good.

Mr. MONK: Well, it encumbers the record, that's all.

The COURT: Well, let this evidence go in.

Mr. MONK: I am not objecting to the medium; that is, I am not objecting to it as secondary evidence or anything of that kind. It is simply encumbering the record.

Plaintiff excepts.

A. Well, I consider they did pay the taxes for these years in the way of settlement with O'Brien county.

Mr. HUGHES: That is not what I asked you. I asked you, Mr. Derby, if during these years they paid any taxes.

A. No, sir; they did not.

Q. When were the first taxes paid by this company upon this land or any other lands in the county claimed by the company?

A. I don't remember the date it was paid by them; they paid the taxes for 1884 in the year 1884.

Q. The first taxes ever paid by the company on these lands was in 1884, was it?

A. I have forgotten whether it was in 1884 or '83 without examining; I have forgotten whether it was '83, '4 or '5 that was paid in '84, '5 and '6.

The COURT: They paid it in '85 for the taxes of 1884.

A. They paid it in 1885, and the taxes of '84, '5 and '6; I think that was it.

Mr. HUGHES: Agreed to pay those taxes?

92 A. Yes; and the county agreed to cancel the back taxes for that period.

Q. Had the Chicago, Milwaukee and St. Paul Railroad Company refused to pay taxes upon this or any of the other lands now claimed by plaintiff prior to that time?

Objected to as immaterial, irrelevant, for the reason it is well established by the decisions of the State that lands situated as these were not taxable until the issuance of the patent prior to the passage of the act of 1884.

Objection sustained.

Defendant excepts.

WARREN WALKER, called as a witness for the defendant, testified as follows:

I reside at Sanborn, Iowa; resided there since October, 1880; I have claimed this county my home since June, 1871; I am acquainted with the Chicago, Milwaukee and St. Paul Railroad Company; I live on the road where it passes through Sanborn.

Q. And east of Sanborn at the township line just east of Sanborn, on what section and what part of the section does that road pass along, or where is it?

Objected to as irrelevant, immaterial and not the best evidence, the defendant not having any such interest as entitles him to call in question the compliance of the company with the terms of the grant, or to impeach the patent that was issued by the governor.

The COURT: Now, Mr. Reporter without definitely determining the question, the evidence will be admitted.

(Last question received by the reporter.)

A. Well, sir, it is. The town of Sanborn is located on the north half of section 35, township 96, range 41, the center of the town being near the center of the section, east and west at that point. The center where the right of way of the Milwaukee Company—that is, the road right of way is $430\frac{4}{10}$ feet.

The COURT: From where?

A. From the center of the section 35.

Q. North?

The COURT: North from the center, you mean?

93 A. North from the center of section 35 on the line between 35 and 36, in township 96, range 41, it is $468\frac{5}{10}$ feet.

The COURT: You don't mean 96, 41?

A. In 97, 41.

Q. North of what point?

A. North of the quarter post between sections 35 and 36, at the township line between 97 range 40 and range 41, on the line between section 31 in township 97, 40, and section 36 in township 97, range 41, it is 573 feet.

Q. North of the quarter post?

A. North of the quarter post between those sections at the east line of 31 in 97–40, it is 700 feet.

Q. North of what?

A. North of the quarter post between section 30 and 31 township 97, range 40.

It would be north of the center line or the quarter post between section 30–31 in 97–40, or north of the center line of these sections running east and west. I refer to the east quarter post of section 31 and the west quarter post of section 30, or the quarter post between section 36 and 31, 97–40; that is, north of the quarter post.

Q. Now, speaking of the quarter post, do you mean the center of the section?

Plaintiffs makes same objection as last above.
Same ruling.
Plaintiff excepts.

A. I mean the—what is called the quarter post of those sections, the Government corner at the center line of those sections; that is, the line running east and west through the center of those sections where the railroad is, is north of the center of those section, being upon the north of all those sections. I was not there at the time the road was constructed, but I have surveyed over the ground since and assisted the engineers in making the survey of the town and the distance, and finding the center some time after the road was built.

Q. Do you know where the McGregor and Western road was first definitely located in O'Brien county, about the center of the county?

94 Objected to as last above.
Objection overruled.
Plaintiff excepts.

Q. That is, whether you know.

A. Well, I don't want to answer that question by just a flat yes or no.

The COURT: Well you either know or you don't know.

A. I know about where it was; I can't tell the exact location.

Q. Do you know where it was located on section 19–95, range 40?

A. I have seen the stakes on that section.

Q. You may state on what part of the section the stakes were driven representing the definite location of the first line, if you know.

Objected to as last above and seeking to impeach the record of the location by parole evidence.

Objection overruled.
Plaintiff excepts.

A. I can't tell the exact part of the section. I know it was on section 19. We were there and looked at it when I first came to the county; we were there and looked at the stakes and where it was supposed that the junction of the two roads would be, but I can't tell the exact part of that section, I didn't measure it; we didn't locate it definitely enough to state what part of the section there it was on; I did not examine the corners in reference to it.

Q. You may state whether you went to that section for the purpose of investigating and ascertaining, if you could, where the two roads were to intersect with each other, that is the Sioux City and St. Paul road with the McGregor and Western road?

A. Yes, we did; there were several of us went out there to look at that; to see where it met. The stakes of both roads were there at that time, and I saw this at the point of intersection.

Q. You may state your best judgment whether these stakes you saw were on the south half or the north half of the section?

95 Objected to as last.
Objection overruled.
Plaintiff excepts.

The COURT: Answer, if you know.

A. I couldn't tell you whether it was north or south of the center; I didn't examine it close enough for that; I have a kind of an idea that it was below, but ain't anyways certain about it, and I couldn't state.

Q. What do you mean by below?

A. Below the center, but I can't state; I never examined the center; I know it was reported at that time that it was south of the center, but I never examined it. My recollection is that it was south of the section, but I can't say whether it was or not; I don't know.

Mr. MONK: How is that your honor? Is it understood that the plaintiff has an exception when an objection is overruled?

The COURT: Yes.

Mr. MONK: Without our noticing it?

The COURT: Yes, I believe the reporter, without any notice, notes exceptions.

The COURT: Any cross-examination, Mr. Monk?

Mr. MONK: No sir; I don't care to cross-examine.

Excused.

Defendant next introduces in evidence a certified copy of a diagram, showing the limits ordered withdrawn under the act of May 12, 1864, of the date September 12, 1864, and February 4, 1869, and March 15, 1870, for the McGregor and Western, now the Chicago, Milwaukee and St. Paul Railway Company.

Also introduces in evidence the certificate of William Andrew Jackson Sparks, Commissioner of the General Land Office, under

date of October, 1887, attached thereto, and asks that the same be marked Exhibit No. "4."

Mr. MONK: Well, your honor, this document goes in without objections. We won't have any fall out about that at all.

Said diagram from its nature and extent is incapable of production in this abstract, but same is attached to the transcript,
96 (see page 149 of Transcript), and the certificate thereto is as follows:

DEFENDANT'S EXHIBIT "4."

OCTOBER, 1887.

I, Wm. A. J. Sparks, hereby certify that the annexed diagram, showing the limits ordered withdrawn under the act of May 12, 1864, by letters of September 12, 1864, February 4, 1869, and March 15, 1870, for the McGregor Western, now Chicago, Milwaukee and St. Paul Railway Company, is a true copy from the original withdrawal diagrams prepared by this office.

JOSEPH MANLEY, called as a witness on behalf of the defendant, *and* testifies as follows:

I live in Liberty township, O'Brien county, Iowa; I have lived in O'Brien county, Iowa, seventeen years the 4th day of last June; I know where section 19, township 95, range 45 is located; I reside not quite three miles from said section.

Q. You may state whether or not about the year 1871 or '72 you knew where the stakes were driven in the ground on that section, marking out and designating the line of the McGregor and Western Railway Company through that part of O'Brien county.

Objected to as incompetent, immaterial and not the best evidence.

The court makes the same ruling as to the question asked the witness Walker.

Plaintiff excepts.

Q. *That* yes or no whether you saw the stakes.

A. Yes, it was a few rods, if I recollect right, south of the center; that is my recollection; I saw the stakes after they were driven in the ground.

Q. You may state about how far south of the center of the section the stakes were driven in the ground which designated and fixed the definite location of the line of the McGregor and Western Railroad through that section.

Objected to the same as last above, and as calling for a conclusion of the witness.

97 Same ruling as before.

Plaintiff excepts.

A. That would be pretty hard to tell. I don't know.

Q. About how far south?

A. Well, I should judge about, probably, from 40 to 60 rods, but then I never measured it.

Q. If you know, state on what quarter section of that section was the place where the two railroads as then located, that is the McGregor and Western and the Sioux City and St. Paul railroad connected or intersected.

Objected to as incompetent, irrelevant, immaterial, and calling for a conclusion of the witness as to where the roads were located.

Same ruling as last above.

Plaintiff excepts.

A. On the southeast quarter—southwest west quarter.

Cross-examination:

Q. How do you know the said roads intersected there?

A. Well, sir, there were stakes there of both roads.

Q. Well, how do you know there were stakes of both roads?

A. Sir?

Q. How do you know there were stakes of both roads?

A. How do I know—how does a man know when he sees where the railroad has been surveyed through?

Q. Did you see the survey through?

A. No, sir; I didn't.

Q. How do you know it had been surveyed through?

A. Well, sir, I see the stakes there.

Q. How do you know who put them there? You don't know anything about it, do you?

A. I think I do, sir.

Q. Well, how do you know?

Objected to.

—. ——.

Q. How do you know?

Objected to because counsel is trying to frighten and intimidate the witness.

98 Q. Can't you tell?

A. Well, I know the stakes is there. I didn't see them put there.

Q. Well, how do — know they are railroad stakes; who told you; who told — they were railroad stakes; who told you they were railroad stakes?

A. Well, I don't know as I can tell who told me.

Q. You were not there when they were placed, were you?

A. No, sir; I wasn't, but then they was.

Q. When did you say you first saw them?

A. I first saw them in 1869, and then I saw them in 1870 and 1871.

Q. '69 was when you first saw them, eh?

A. Yes, sir.

Q. You did?
A. Yes, sir.
That's all.

Redirect examination:

Q. You may state whether or not you noticed any stakes or marks indicating that they were stakes designating the location of a railroad.

Objected to as incompetent, irrelevant, immaterial, and calling for a conclusion of the witness and not for a statement of fact.
Same ruling as last above.
Plaintiff excepts.

A. Yes; I see the marks were there.

Recross-examination:

Mr. MONK:

Q. You are sure you saw the marks there, are you?
A. Yes, sir.

Excused.

HOWARD M. HAMBLIN, defendant, called in his own behalf and testified as follows:

I am the defendant; I reside on the northeast quarter section 1, in Hull township 95–41, O'Brien county, Iowa. I have lived in O'Brien county five years last November; have lived on
99 said land four years in March. I first took possession of the land in controversy four years ago the 14th day of last February. I made improvements the same day.

Objected to as incompetent, irrelevant and immaterial.
Same ruling as to the questions asked last previous witness.
Plaintiff excepts.

I built a house and barn, dug a well, done some breaking, put out small fruit, raspberries, strawberries, blackberries, gooseberries and currants; I have a barn or shed and corn crib, outhouses, a number of acres placed under cultivation by me; I have a wife and one child; they are residing on the land, and always have been since we entered upon it, excepting when visiting home and other places; that has been my home ever since I entered upon it; I am a citizen of the United States; born in the State of Maine; I am a voter in this county; I am a taxpayer also; my voting place is in Dale township; the southwest part of Dale is where we have our voting place in this county and State, that is the same township where the land in controversy is located.

Q. You may state whether you have made any application to enter the land upon which you are residing.

Objected to as incompetent, immaterial and irrelevant.

Same ruling as last above.
Plaintiff excepts.

A. I have.
Q. About when did you make that application for your number?

Same objection as last above.
Same ruling.
Plaintiff excepts.

A. The application was made in September, 1885; I think the second application; I made one application before that; the second application, at which time I took my appeal, was made in September, 1885.
Q. Was that a homestead or a timber claim?

Same objection as last above.
Same ruling.
100 Plaintiff excepts.

A. It was a homestead application. I took my first application February, 1884.
Q. What was the nature of that application?

Same objection as last above.
Same ruling.
Plaintiff excepts.

A. A homestead.
Q. By what authority did you enter upon the land in question in this case?

Same objection as last above.
Same ruling.
Plaintiff excepts.

A. By authority of the Secretary of the Interior, of the Land Commissioner, and Mr. Struble.
Q. Of the United States?
A. Yes, sir.
The COURT: What was that last?
A. By the authority of the Secretary of the Interior, the Land Commissioner, and Mr. Struble.
Q. Of the United States?
A. Mr. Struble, of Iowa; yes, the Land Commissioner of the United States.
Q. The Commissioner of the General Land Office of the United States, do you refer to?

Objected to as last above.
Same ruling.
Plaintiff excepts.

A. Yes, sir.
Q. And the Secretary of the Interior of the United States?

Same objection as last above.

Same ruling.
Plaintiff excepts.

A. Yes, sir.

Q. You may state whether or not you entered with the consent of the Secretary of the Interior and the Commissioner of the General Land Office of the United States.

101 Same objection as last above and calling for an opinion of the fact and not for facts.

Same ruling.
Plaintiff excepts.

A. I so understood it; yes.

Cross-examination.

Before I settled on the land I had a letter from the Commissioner of the General Land Office, the letter Mr. Struble has; there is a number of men in this town that saw it; Mr. Struble requested it of me; I had a talk with Mr. Struble about it; I had a talk with the Commissioner of the General Land Office, also, when I was on the land; before I settled on the land I had the Commissioner's legal advice; I saw him June, 1885, about the 25th of the month; I was not aware that there was any litigation at that time about this land; I saw Mr. Hall's report on my way to the western part of the State in July, 1883.

Moved to strike out the answer in reference to Hall's report as not responsive.
Sustained.
Defendant excepts.

My first talk with the Commissioner of the General Land Office was in 1885; my first talk with the Secretary of the Interior was a letter; that was in the early part of 1884; I do not know where that letter is; I last saw it in the summer of 1884 or 1885; I can't tell what I did do with it; among the many hundred letters I had at that time I could not tell what became of it; I did not give it to Struble; Mr. Teller was Secretary of the Interior when I received the letter; Mr. Struble advised me in regard to going on the land; my time when I am not at court is and has been spent at the agency in Nebraska, Winnebago agency; I am surgeon there; I have occupied that position about 15 months; during that time I have spent

102 most of my time there except when visiting my family, who reside here on the land; I built a fair house, 14 x 30, 16 x 30, three rooms, one story, a barn, a fair barn, made of boards, poste, etc., such as Iowa abounds with; it must be 18 x 35, 8 or 9 feet high, I reckon; I call that a barn; there is about 15 or 18 acres of breaking on the quarter I live on; I did not break it; I paid a man for doing the breaking; the first season that I had my land broke, I don't remember the exact amount; it was quite a strip off one side; I never measured it, I lumped it; I raised oats last year; I cannot say how much I cut only approximate; I can't tell how many acres

there was in it; I rented it for a share of the crop; there was potatoes and small fruit; I have some potatoes, apples, some choice grapes, a dozen vines, strawberries and raspberries; I put out a quarter of an acre of strawberries, I think they are all kinds; they were bearing last season; I put out 200 raspberries, 200 vines; then I had a good crop of grass, natural grass, I prefer it to tame. I think that is all.

Redirect examination.

Mr. Struble is member of Congress from this district; he held the same position when I had the conversation with him. The letter I received from the Secretary of the Interior was received before I went on the land.

Recross-examination.

I received the letter in 1884; that was before I went on the land; Struble is a member of Congress; I could not swear that he was a lawyer.

Witness excused.

Defendant offers in evidence the pleadings in the case of the Chicago, Milwaukee and St. Paul R. R. Co. in the United States Supreme Court, in which the decree has been introduced in evidence by the plaintiff, which pleadings are as follows:

103 Circuit Court of the United States, for the District of Iowa.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, Plaintiff,
*against*
THE SIOUX CITY AND ST. PAUL RAILROAD COMPANY, Alexander H. Rice and Elias F. Drake, Trustees; John H. Gear, Governor, and James K. Powers, Register of the State Land Office, of the State of Iowa, Defendants. } In Equity.

*Bill of Complaint.*

To the judges of the circuit court of the United States for the district of Iowa.

The Chicago, Milwaukee and St. Paul Railway Company of Wisconsin, a corporation duly organized under and by virtue of the laws of the State of Wisconsin, and a citizen of said State, having its principal place of business at the city of Milwaukee, in the State of Wisconsin, brings this its bill against the Sioux City and St. Paul Railway Company, a corporation duly organized under and by virtue of the laws of the State of Iowa, and a citizen of the State of Iowa; and Alexander H. Rice of Massachusetts, and a citizen of the State of Massachusetts; and Elias F. Drake of Minnesota, and a citizen of the State of Minnesota; and John H. Gear, Governor of the State of Iowa; and James K. Powers, register of the State land

office of the State of Iowa, and a citizen of the State of Iowa, and thereupon your orator complains and says:

That the Congress of the United States by an act entitled: "An act for the granting of lands to the State of Iowa in alternate sections to aid in the construction of a railroad in said State,"
104 approved May 12, 1864, granted to the State of Iowa for the purpose of aiding in the construction of a railroad from Sioux City, in said State, to the south line of the State of Minnesota at such point as the said State of Iowa might select, between the Big Sioux and the West fork of the Des Moines river. And also granted to said State for the use and benefit of the McGregor Western Railway Company, for the purpose of aiding in the construction of a railroad from a point at or near the foot of Main street, South McGregor, in said State, in a westerly direction by the most practicable route on or near the forty-third parallel of north latitude until it shall intersect said road running from Sioux City to the State's line in the county of O'Brien, in said State, every alternate section of land, designated by odd numbers, for ten sections in width on each side of said roads, but said act provided that in case it should appear that the United States have, when the line or routes of said roads are definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement should have attached to the same, or that the same should have been reserved by the United States for any purpose whatever, then it should be the duty of the Secretary of the Interior to cause to be selected for the purpose aforesaid from the public lands aforesaid, as near as possible to the tier of sections above specified, so much land in alternate sections or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States shall have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption should have attached, as aforesaid; which lands thus indicated by odd-numbered sections, by the direction of the Secretary of the Interior, shall be held by the State of Iowa for the uses and purposes aforesaid; provided that the lands so selected, should in no case be located more than twenty miles from the lines of said roads; a copy of which said act is hereto annexed as "Exhibit No. 1," and to which exhibit and to all other exhibits hereunto attached, your orator prays leave to refer, and make the same a part of this bill of complaint, the same as if said exhibits were fully set forth in the body thereof.

That the legislature of the State of Iowa by an act entitled:
105 "An act to accept the grant of lands to the State of Iowa, made by act of Congress May 12, 1864, and to carry out the provisions of said act entitled, 'An act for the granting of lands to the State of Iowa in alternate sections, to aid in the construction of a railroad in said State,'" approved April 20, 1866, accepted the grant of land so made by Congress, a copy of which statute is hereunto annexed and marked "Exhibit No. 2." And that said last act was afterwards amended by an act approved on the 24th day of

March, 1868, by correcting a clerical error therein, which last act is hereto attached as "Exhibit No. 3."

That the legislature of the State of Iowa by an act entitled: "An act to resume all the lands and rights conferred upon the McGregor Western Railway Company by or under the act of Congress, approved May 12, 1864," approved February 27, 1868, provided:

That all lands and all rights to said lands granted or intended to be granted to the McGregor Western Railway Company by the said act of Congress, be and the same thereby were absolutely and entirely resumed by the State of Iowa, and that they be as fully and absolutely vested in said State as if the same had never been granted to the said railway company, which last act is hereto attached as "Exhibit No. 4."

That the Legislature of the State of Iowa by an act entitled: "An act making a grant of lands of the McGregor and Sioux City Railway Company, or in case of their failure to accept the same, to the Forty-third Parallel Company, and to execute the trust conferred by act of Congress entitled, 'An act for the granting of lands to the State of Iowa in alternate sections to aid in the construction of a railroad in said State, approved May 12, 1864,'" approved March 31, 1868, granted all the rights and privileges in the land so granted to the State of Iowa, to the McGregor and Sioux City Railway Company, on certain conditions therein named, a copy of which act is hereunto annexed and marked "Exhibit No. 5."

That on the 28th day of April, 1868, the McGregor Western Railroad Company executed and delivered to the McGregor and Sioux City Railway Co. an instrument in writing whereby it absolutely, legally and effectually waived, released and surrendered all claim, right or interest of the McGregor Western Railway Company, its successors or assigns, in or to any of the said lands granted the State of Iowa, by the act of Congress, approved March 12th, 1864, which claim, right or interest might arise out of or on account of any railroad theretofore constructed by the said McGregor Western Railway Company, a copy of which instrument is hereto annexed and marked "Exhibit No. 6."

106

That the said McGregor and Sioux City Railway Company within sixty days after the passage of said act, approved March 31, 1868, (Exhibit No. 5.) filed in the office of the secretary of the State of Iowa, a written acceptance of said act, as therein required to do, and at the same time filed therewith the aforesaid release and waiver made by the McGregor Western Railway Company, and herein set forth as Exhibit No. 6, in compliance with section 9 of said act of 1868, herein set forth as Exhibit No. 5, a copy of which said acceptance is hereunto annexed and marked "Exhibit No. 7."

That on the 1st day of November, 1869, the McGregor and Sioux City Railway Company changed its name to the "McGregor and Missouri River Railway Company," and from and after that time it was known and called by said latter name.

That on or about the 19th day of August, A. D. 1864, the McGregor Western Railway Company located its line of railroad from McGregor, in Clayton county, Iowa, to Calmar, in the county of

Winneshiek, in said State, and thence westward through the counties of Chickasaw, Floyd, Cerro Gordo, Hancock, Kossuth, Palo Alto, Clay and O'Brien, in said State of Iowa, to a point in O'Brien county, section 19, township 95, north, range 40, west, which point, for the reasons thereinafter stated, it believed would be the point of intersection referred to in the act of Congress aforesaid, and a map of its said location was filed in the General Land Office of the United States on the 30th day of August, A. D. 1864; and on the 12th day of the following September, all the lands, designated by odd numbered sections, within twenty miles of either side of said line, not sold or reserved, were withdrawn from market and selected by the proper official authorities; and the line of the said location
107 is shown on the annexed diagram or map by a line marked "McGregor Western railway line of 1864, which said map is hereunto annexed and marked "Exhibit No. 8."

That the Land Department of the United States in its annual reports and otherwise for the years 1865 and 1866 and partially in 1867 issued and published a map of Iowa, entitled: "Diagram of public lands in Iowa," on which the line of railroad, with which the McGregor Company were required to intersect in O'Brien county, is shown in nearly a straight line from Sioux City to the Minnesota State line in range 34, crossing O'Brien county diagonally from the southwest to the northeast corner, which said publications were known to the defendant, The Sioux City and St. Paul Railroad Company, and treated by the officers of said company, before and after their pretended location in 1867, as the probable route of their railroad, which said line is designated on the annexed diagram or plat (Exhibit No. 8) as "Sioux City and St. Paul railroad proposed route."

That on the 2d day of April, 1867, the defendant, The Sioux City and St. Paul Railroad Company, located its line of road from the south line of the State of Minnesota, in range 40, southward to Le Mars, in the county of Plymouth, in the State of Iowa, in township 92, range 45, said line barely crossing the northwest corner of O'Brien county, in said State of Iowa, and within three miles of said northwest corner, and that the westerly point thereof was ten miles north and twelve miles west of section 19, township 95, range 40, west, and the defendant, The Sioux City and St. Paul Railroad Company, filed a map of said location in the General Land Office of the United States on the 17th day of July, 1867, which said line is designated on the annexed diagram or plat (Exhibit No. 8) as "Sioux City and St. Paul railroad line of 1867."

That on the 13th day of May, 1868, the Commissioner of the General Land Office of the United States, because this location of The Sioux City and St. Paul Railroad Company, defendant, of 1867, and the location of the McGregor Western Railway Company of 1864, did not intersect in the county of O'Brien, as required by the act of Congress aforesaid, required the said McGregor and
108 Sioux City Railway Company, by its peremptory order, to relocate their line through the counties of Clay and O'Brien to the point of intersection with the Sioux City and St. Paul line in

the county of O'Brien, and that such relocation was made by the said McGregor and Sioux City Railway Company in pursuance thereof, and which said line is designated on the annexed plat or diagram (Exhibit No. 8) as "Relocated line of McGregor and Missouri River Railway Company," and early in the year 1869 the McGregor and Missouri River Railway Company filed with the Secretary of the Interior, in the General Land Office, a map of said relocation.

That the State of Iowa has never selected, and as your orator believes has never been requested to select any point on the south line of the State of Minnesota, between the Big Sioux and the West fork of the Des Moines river, as the terminal point of the line of railroad from Sioux City to such point as prescribed in the said act of Congress. (Exhibit No. 1.)

That at the close of the year 1865 the McGregor Western Railway Company had completed, in full compliance with the act of Congress aforesaid, a line of first-class railroad and were operating the same from McGregor, Iowa, to Calmar, in Winneshiek county, Iowa, a distance of 42 miles, and that afterwards, and in the years 1868, 1869 and 1870 the McGregor and Missouri River Railway Company completed, in full compliance with the act of Congress aforesaid, a line of first-class railroad from Calmar, in Winneshiek county, to Algona, in Kossuth county, Iowa, a distance of 172 miles of railroad, completed in compliance with the acts of the legislature of the State of Iowa aforesaid.

That on the 13th day of November, 1865, William M. Stone, then governor of the State of Iowa, made his certificate, in pursuance of said act of Congress (Exhibit No. 1,) to the Secretary of the Interior of the United States, that the said McGregor Western Railway Company had completed forty miles of said railroad, in compliance with the terms of said act, and that prior to the 1st day of November, 1870, Samuel Merrill, then governor of the State of Iowa, made his certificate to the Secretary of the Interior of the United States, that

the said McGregor and Missouri Railway Company, or those
109 to whose rights it has succeeded, had completed in a good,
substantial and workmanlike manner as a first-class railroad,

172 miles of its line west from McGregor aforesaid, to Algona aforesaid, in full compliance with law. That the defendant, The Sioux City and St. Paul Railroad Company, have never constructed any railroad whatever from Sioux City, Iowa, to any point on the south line of the State of Minnesota, but, on the contrary, about the year 1872, it commenced the construction of a railroad on Minnesota State line, in range 41 west, and completed the first section of ten miles southward from said State line, about the 15th day of June, 1872, and on or about the 25th of September, 1872, it completed its road southward as far as Le Mars aforesaid, but upon a line varying widely from its located line before mentioned, which line is designated on the annexed plat, "Sioux City and St. Paul railroad as completed," and from the village of Le Mars aforesaid, to Sioux City, it constructed no road whatever, but as your orator is informed and believes, and so states the fact to be, procured from another com-

pany the right for ten years from and after the year 1872, to run its cars on the railroad already completed between the two points last mentioned, by the Iowa Falls and Sioux City Railway Company, by the aid of a certain other congressional grant, approved May 15, 1856.

That the length of the present line of the Sioux City and St. Paul railroad, now constructed from the south line of the State of Minnesota aforesaid to Le Mars, is 56¼ miles or thereabouts, which is all the road ever constructed by the said company in Iowa.

That the length of the line between Le Mars and Sioux City, over which the Sioux City and St. Paul Railroad Company runs its cars, over the track of another company, is twenty-four miles.

That at the date of the congressional grant aforesaid, the Government lands designated by odd-numbered sections within twenty miles of either side of the line from McGregor westward and east of the east line of Kossuth county, Iowa, had all been sold, reserved or otherwise appropriated by the United States, with a few unimportant exceptions.

110 That west of the east line of Kossuth county, Iowa, and thence west within twenty miles on either side of the line located by the McGregor and Missouri River Railway Company, large quantities of the Government lands, designated by odd-numbered sections, had been sold, reserved or otherwise appropriated by the United States prior to the taking effect of said congressional grant, so that under the same there could be found that inured to the McGregor grant, within both the ten and twenty mile limits, only about four hundred and seventy-five sections, or three hundred and four thousand acres, exclusive of the lands in controversy in this suit, owing to the said prior sales, reserves and appropriations, and including the lands in controversy. There is left to inure to the McGregor road under the whole grant aforesaid, only about 760 sections, or 486,000 acres.

That the McGregor and Missouri River Railway Company failed to construct a road from Algona to the point of junction with the Sioux City and St. Paul railroad in the county of O'Brien, a distance of about 85 miles, as provided by the act of the legislature of the State of Iowa, conferring the land grant upon that company, approved March 31, 1868, and neither it, or any other railroad company, ever constructed any road under the aforesaid act of Congress other than has been herein set out; and that in consequence of such failure, the said legislature by an act entitled "An act relating to the lands heretofore granted to the McGregor and Missouri River Railroad Company, resuming said lands and regranting the same upon new conditions to said company, and providing for forfeiture thereof, and in case of such forfeiture, for the disposition to be made of said lands," approved March 15, 1876, which act is hereto annexed as Exhibit No. 9, enacted:

"That whereas, the McGregor and Sioux City Railway Company, now known as the 'McGregor and Missouri River Railway Company,' has failed to comply with the conditions and provisions of the acts of the 12th General Assembly of the State of Iowa, approved

March 31st, 1868, entitled 'An act making a grant of land to the McGregor and Sioux City Railway Company';

111 "Now, therefore, all lands or rights to lands saving and excepting all those tracts and parcels lying within twenty miles on either side of the located or constructed line of the Sioux City and St. Paul Railroad Company, and within what is known as the overlapping limits heretofore granted or intended to be granted to the McGregor and Sioux City Railway Company, be and the same are hereby absolutely and entirely resumed by the State of Iowa."

And further enacted that said lands so resumed should be re-granted to the said McGregor and Missouri River Railway Company upon certain terms and conditions therein specified, which said act was not accepted by the said McGregor and Missouri River Railway Company, or by any other company, and no road was ever built or action taken under the same.

That the legislature of the State of Iowa, by an act entitled "An act in relation to the lands granted to the State of Iowa by act of Congress, entitled 'An act for the granting of lands to the State of Iowa in alternate sections to aid in the construction of a railroad in said State, approved May 12, 1864, and to grant to and impose upon the Chicago, Milwaukee and St. Paul Railway Company the powers and liabilities mentioned in chapter 4, title X, of the Code,' approved February 27, 1878," a copy of which act is hereto attached as "Exhibit No. 10," recited that:

"Whereas, the McGregor and Sioux City Railway Company, now known as the McGregor and Missouri River Railway Company, has failed to comply with the provisions of the act of the Twelfth General Assembly of the State of Iowa, approved March 31, 1868, entitled 'An act making a grant of land to the McGregor and Sioux City Railway Company.'"

Therefore the legislature enacted, that:

All lands or rights to lands theretofore granted to the McGregor and Sioux City Railway Company be and the same were thereby absolutely and entirely resumed to the State of Iowa.

And further enacted, that:

All lands and rights to lands, whether in severalty, jointly, or in common, and including all lands, or rights to lands, or

112 any interests therein or claims thereto, whether certified or not, embraced within the overlapping or conflicting limits of the two grants of roads made and described by the act of Congress thereinafter designated granted to the State of Iowa, to aid in the construction of a railroad from a point at or near the foot of Main street, South McGregor, in said State, in a westerly direction by the most practicable route on or near the 43rd parallel of north latitude, until it should intersect in the county of O'Brien the railroad running from Sioux City, in the State of Iowa, to the Minnesota State line, by act of Congress approved May 12, 1864, and entitled: "An act for the granting of lands to the State of Iowa in alternate sections, to aid in the construction of a railroad in said State," be and the same were thereby granted and conferred upon your orator, The

Chicago, Milwaukee and St. Paul Railway Company upon certain conditions therein set forth.

That your orator accepted the said grant, by giving bond, and filing its acceptance with the secretary of state of the State of Iowa, within the time therein prescribed, which bond was duly approved by the governor of the State of Iowa; and that your orator during the year 1878 completed, constructed and built the railroad from Algona aforesaid to the said point of junction with the Sioux City and St. Paul railroad in O'Brien county at Sheldon, and fully complied with the terms and conditions of said act in completing a first-class railroad between said points, which was duly accepted.

That prior to the first day of January, A. D. 1879, the governor of the State of Iowa, certified to the Secretary of the Interior of the United States, that your orator had before that time completed its said railroad from Algona, in Kossuth county, Iowa, to Sheldon, in O'Brien county, Iowa, a distance of about 85 miles, in a good, substantial and workmanlike manner, as a first-class railroad, and in full compliance with the last-mentioned act of the legislature of the State of Iowa, and with the act of Congress aforesaid, approved May 12th, 1864, whereby your orator became entitled to demand and receive from the governor of the State of Iowa and the register
113 of its State land office a patent for all the lands inuring to the McGregor railroad, from a point at or near the foot of Main street, South McGregor, in said State, in a westerly direction by the most practicable route on or near the 43rd parallel of north latitude to the point of the intersection in O'Brien county, with the railroad running from Sioux City to the State line under the act of Congress aforesaid, which had not been previously patented to the McGregor and Missouri River Railway Company.

That on the 9th day of June, A. D. 1873, the Commissioner of the General Land Office of the United States, disregarding the rights of the State of Iowa, and the rights inuring to the McGregor railroad, wrongfully, unlawfully and mistakenly certified to the Secretary of the Interior of the United States as lands inuring to the State of Iowa, to aid in the construction of the said Sioux City and St. Paul railroad, and recommending that the same be approved and carried into patent, a list of lands which are hereto annexed and marked "Exhibit No. 11."

That on the 10th day of June, 1878, the Secretary of the Interior of the United States, disregarding the rights aforesaid, wrongfully, unlawfully and mistakenly approved said list and certificate and recommendation, and in pursuance thereof on the 17th day of June, 1873, a patent from the United States, was wrongfully, unlawfully and mistakenly executed and issued to the State of Iowa, for all the aforesaid lands for the use and benefit of the Sioux City and St. Paul Railroad Company.

That on or about the 25th day of January, 1875, by the same wrong and mistake, by the same officers of the United States, an additional list of lands was wrongfully, unlawfully and mistakenly patented to the State of Iowa, for the use and benefit of the Sioux

City and St. Paul Railroad Company, in the same manner, which list of lands is hereto annexed and marked "Exhibit 12."

That on or about the 31st day of September, 1877, the governor and register of the State land office of the State of Iowa, certified to the defendant, The Sioux City and St. Paul Railroad Company, wrongfully, unlawfully and mistakenly, as inuring to the said
114 company, under the act of Congress, approved May 12, 1864, the list of lands which is hereto annexed and marked "Exhibit 13."

That all the lands described in the three last exhibits are situated in the State of Iowa, in the counties of Dickinson, Osceola and O'Brien, and are situated within twenty miles of one side or the other of your orator's line of road, which has been approved by the proper legal authorities, and also lie between twenty miles on one side or the other of the line of the defendant's, The Sioux City and St. Paul Railroad Company's road, and are claimed by both companies under the grant aforesaid.

That the defendants, John H. Gear, governor of the State of Iowa, and James K. Powers, register of the State land office of the State of Iowa, wrongfully, unlawfully and mistakenly refused to issue to your orator patents for, or in any other manner to convey to your orator any of the said lands embraced in the three lists or exhibits last referred to.

That on or about the 1st day of August, 1871, the defendant, the Sioux City and St. Paul Railroad Company made and executed to the defendants, Alexander H. Rice and E. F. Drake, trustees for the holders of the bonds hereinafter mentioned, a mortgage of all the lands granted by Congress, by the act approved May 12, 1864, lying and being in the State of Iowa, that might thereafter be patented or transferred by the United States or the State of Iowa to the said Sioux City and St. Paul Railroad Company, or to which said company might acquire title by reason of said grant, to secure the payment of $2,800,000, of bonds, to be issued by said company, bearing semi-annual interest at the rate of 4 per cent.

That your orator is informed and believes that the said defendants, Alexander H. Rice and E. F. Drake, claim an interest in or lien upon the lands hereinbefore described by virtue of said mortgage.

Your orator further shows that the said Sioux City and St. Paul Railroad Company is now offering the lands, hereinbefore described, for sale and is attempting to make sales thereof to purchasers ignorant of your orator's rights, and your orator fears that if
115 said company is not restrained from so doing that it will make sales of said lands, and that a cloud will thereby be cast upon the title of your orator, and that great injury and wrong may be done your orator by the said defendant, Sioux City and St. Paul Railroad Company, thereby.

In tender consideration wherof, and inasmuch as your orator is remediless at or by the strict rules of the common law and can only be relieved in a court of equity, where such matters are properly cognizable and relievable, to the end, therefore, that the said Sioux City and St. Paul Railroad Company, Alexander H. Rice,

Elias F. Drake, John H. Gear, and James K. Powers, register of the State land office of the State of Iowa, may appear and answer this your orator's bill without oath, your orator hereby waiving the necessity of the answer of such defendants being put in under oaths of the said defendants or the oath of either of them. And that the certificate or certificates heretofore issued by the governor and register of the State land office to the said defendant, Sioux City and St. Paul Railroad Company, for the lands or any part thereof hereinbefore described, may be annulled, vacated, and set aside by the decree of this honorable court, and that said governor and register of the State land office may be directed to issue a certificate, patent or other proper conveyance thereof, to your orator, so as to convey the title to said lands to your orator; and that it may be further decreed that said lands are free and clear from the lien of the mortgage so as aforesaid executed by the said Sioux City and St. Paul Railroad Company to the said Alexander H. Rice and Elias F. Drake; and that your orator may have such other relief as the nature of the case shall require and as shall be agreeable to equity.

May it please your honors to grant unto your orator a writ of injunction, issuing out of and under the seal of this honorable court, directed to the said defendant, The Sioux City and St. Paul Railroad Company, its officers, agents, attorneys, and directors, enjoining and restraining them and each of them from selling or conveying said lands or any parts or portions thereof, or from making any encumbrance thereon or in any manner disposing of the same.

116 And may it please your honors to grant unto your orator a writ of subpœna, issuing out of and under the seal of this honorable court, to be directed to the said Sioux City and St. Paul Railroad Company, Alexander H. Rice, Elias F. Drake, John H. Gear, governor, and James K. Powers, register of the land office of the State of Iowa, commanding them and each of them, by a certain day and under a certain penalty therein to be inserted, to be and appear before your honors, and then and there to answer the premises, and, further, to stand to and abide such order and decree therein as shall be agreeable to equity and good conscience. And your orator will ever pray.

JOHN W. CARY,
*Solicitor for Complainant.*

THOS. UPDEGRAFF, *Of Counsel.*

UNITED STATES OF AMERICA,
*Eastern District of Wisconsin,* } *ss:*

Alexander Mitchell, being duly sworn, deposes and says that he is the president of the Chicago, Milwaukee and St. Paul Railway Company, the complainant above named; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

ALEXANDER MITCHELL.

Subscribed and sworn to before me this 1st day of March, 1879.

HUGH RYAN,
*U. S. Circuit Court Commissioner.*

*Answer of John H. Gear and James K. Powers.*

Comes now John H. Gear, governor, and James K. Powers, register of the State land office of the State of Iowa, parties defendant to plaintiff's bill of complaint in this cause filed, saving severally to themselves all exceptions by reason of the errors and imperfections in the said bill, answering say:

117 They admit that the Congress of the United States and the legislature of the State of Iowa enacted the various statutes severally, as the complainant has set forth as exhibits in its said bill.

That as to all other matters alleged in said bill, these defendants have not sufficient knowledge or information on which to form a belief.

These defendants, therefore, ask that various allegations in plaintiff's bill, not by this their answer admitted, the said plaintiff be required to prove.

They pray to be dismissed from this cause with costs.

J. F. McJUNKIN,
*Attorney General State of Iowa, Solicitor for Defendants.*

JOHN H. GEAR AND JAMES K. POWERS.

*Answer of the Sioux City and St. Paul Railroad Company, and Alexander H. Rice, Elias F. Drake, Trustees.*

The joint and several answers of the Sioux City and St. Paul Railroad Company, Alexander H. Rice and Elias F. Drake, trustees, defendants to the bill of complaint of the Chicago, Milwaukee and St. Paul Company, complainant.

These defendants reserving to themselves and each of them all right of exception to the said bill of complaint, for answer thereto saith:

1. That the defendants admit that the Sioux City and St. Paul Railroad Company was duly organized under and by virtue of the laws of the State of Iowa, and a citizen of said State, and admit the citizenship and residence of the other defendants as alleged in said bill of complaint.

2. And these defendants, further answering, admit the passage of the act of Congress, set forth and shown in "Exhibit 1" of said bill of complaint, and the said act is here referred to as showing what was enacted therein, and beg leave to make the same a part of their answer and refer to therein the same as though the same was fully set forth in such answer.

118 3. That these defendants admit the passage of the acts of the legislature of the State of Iowa, set forth and shown in Exhibits Nos. 2, 3, 4, 5, of the said bill of complaint, and for greater

certainty for what was enacted therein, beg leave to refer the same to this court for the construction, interpretation and effect thereof.

4. That these defendants admit that instruments in writing, of which Exhibits 6 and 7 of the said bill of complaint are copies, were filed in the office of the secretary of state of Iowa at the time alleged in said bill, but these defendants further severally say that they or any or either of them to the knowledge or belief of the other or either of them, do not know and have never been informed, save by the said complainant's bill and cannot set forth as to their belief or otherwise, whether the McGregor Western Railway Company executed and delivered to the McGregor and Sioux City Railway Company the instrument shown as "Exhibit 6," or whether the acceptance set forth in Exhibit 7 was ever duly executed by the McGregor and Sioux City Railway Company, and leave the complainant to make proof thereof, as it shall be advised is material, and if the same are proven and admitted these defendants, for greater certainty, beg leave to refer the said instrument when the same shall have been produced to this court for the interpretation and effect thereof.

5. That these defendants admit that on or about the 19th day of August, 1864, the McGregor Western railway definitely fixed and located its line of railroad from McGregor, in Clayton county, Iowa, to Calmar, in Winnesheik county, and thence westward through the counties of Chickasaw, Floyd, Cerro Gordo, Hancock, Kossuth, Palo Alto, Clay and O'Brien, to a point in O'Brien county in section (19), township (95), range (40), and that a map of such location was filed in the General Land Office of the United States on the 30th day of August, 1864, and that on the 12th day of September following, the odd-numberbed sections within twenty miles on either side of said line not sold, reserved or otherwise appropriated were withdrawn from market and selected by the proper official authori-
ties, and the said location is shown on diagram annexed
119 to said bill as "McGregor Western railway line, 1864."
And as these defendants allege that the said line was by the said McGregor Western railway line definitely fixed and located from a point at or near the foot of Main street, South McGregor in the State of Iowa, in a westerly direction by the most practicable route at or near the 43d parallel of north latitude to a point in O'Brien county, in section 19, township 95, range 41, and that on or about the 30th day of August, A. D. 1864, the McGregor Western Railway Company, through its officers, caused to be filed in the office of the Secretary of the Interior of the United States, a map of such location of their road, and on the 12th day of September, A. D. 1864, the Commissioner of the General Land Office of the United States under the provisions of sections 5 and 8 of the act of Congress, approved May 12th, 1864, by an order from said department directed and sent to the land officers at Sioux City, Iowa, withdrew from said location, homestead entry and pre-emption claim all the odd-numbered sections of public lands in said district within twenty miles on each side of said located line, which order was received by said officers of the land office at Sioux City, September

29th, 1864, and the lands were from that date withdrawn in accordance with said orders, and on the 24th day of October, A. D. 1864, the Commissioner of the General Land Office, in order to more definitely fix and determine the lands so withdrawn and to select and reserve the same for said McGregor Western Railway Company, made and forwarded to the local land office at Sioux City a map showing the line of said road and indicating and defining the ten-mile limits of the said grant by line in pink color drawn on said map, and the twenty-mile limits of said grant by a line in green color; and directing that the even-numbered sections within such ten-mile limits be subject to sale or pre-emption at $2.50 per acre, and to homestead entry subject to the restriction in the first section of the homestead act.

That upon the diagram hereto annexed, are shown lines defining the ten and twenty-mile limits referred to in said order of October 24th and accompanying map designating the lands so selected and withdrawn, called ten-mile limits withdrawn Octobor 24th, 1864," and "20-mile limits withdrawn October 24th, 1864," which
120 diagram is hereto annexed to this answer and appears upon the map, marked Exhibit "A."

And these defendants allege that thereupon the limits of the grant of the State of Iowa for the use and benefit of the McGregor Western Railway Company became fixed and determined by the said act of the said railway company and the proper officers of the United States; and there was afterwards sold and disposed of by the United States, within the said ten-mile limits of such location as so defined, large quantities of the land by purchase, pre-emption and homestead entry at the double minimum price provided for in said act of Congress of May 12th, 1864. (Exhibit No. 1 of plaintiff's bill.)

6. And these defendants further severally say that they, or any, or either of them do not know, and have never been informed, save by the complainant's said bill, and cannot set forth as to their belief or otherwise, whether the said Land Department of the United States in its annual reports and otherwise for the years 1865, 1866, and partially in 1867, issued and published a map of Iowa entitled "Diagram of Public Lands in Iowa," on which the line of railroad with which the McGregor Company were required to intersect in O'Brien county, is shown in nearly a straight line from Sioux City to the Minnesota State line in range 34, crossing O'Brien county diagonally from southwest to northeast corner, or whether they published any map or diagram during said years showing any line or route of said road in any manner.

And these defendants deny that said publications were known to the Sioux City and St. Paul Railroad Company, and deny that the said publication, or said line or route of said road shown thereon was ever treated by the officers of the said company either before or after, or during the year 1864, or at any time as the probable route of their railroad as having any connection with, or reference or relation to their line of road or that they had any knowledge or notice thereof.

And these defendants allege that the Sioux City and St. Paul Railroad Company was not organized or in existence prior to the 1st day of January, 1866, and that they had no line or route of road prior to the location of their line in the fall of 1866,* as here-
121 inafter stated, which location was made without reference to or knowledge as such publication.

7. That these defendants deny each and every allegation in the eleventh paragraph of said bill of complainant, relating to the location of the line of the Sioux City and St. Paul railroad, except as the same may correspond with the facts hereinafter alleged in relation thereto, in paragraph 24 of this answer.

8. That these defendants deny each and every allegation in the twelfth paragraph of said complaint, and in respect to the matters set forth in said paragraph, and that the said McGregor and Sioux City Railway Company, by its officers and agents intending and designing to injure and defraud the defendant company, and deprive it of a portion of its lands, to wit: the lands described in said bill of complaint, procured the acquiescence of the Land Department of the United States, to the various steps, orders, approvals, letters and withdrawals referred to in said paragraph of said bill of complaint in reference to the survey and alleged location of said line through said counties of Clay and O'Brien to an intersection with the Sioux City and St. Paul line in said county of O'Brien.

That in furtherance of said fraudulent and unlawful purpose said McGregor and Sioux City Railway Company did in the year 1869 cause a pretended survey to be made of said new line (though with what care and thoroughness these defendants are not advised) and did cause a map thereof, through said county of Clay, but no farther, to be made of the same and filed with the Secretary of the Interior and afterwards in said year 1869 did make a furtherance of said pretended line through the county of O'Brien to an intersection with the line of the defendant company and caused a map thereof to be made and filed with the Secretary of the Interior in September of that year.

That said survey of said line and the making and filing of the maps thereof was done wholly without authority of law or of any act, direction or order of any officer of the United States having authority in the premises; that the same was not in compli-
122 ance with any order of the Commissioner of the General Land Office, but was in direct violation thereof, and an unwarranted departure from the lines of route as definitely fixed and located in 1864, as stated in the said bill of complaint, and herein, and from the lines of road referred to and contemplated in the said act of Congress, (Exhibit 1 of said bill of complaint,) requiring the said road to be located on or near the 43d parallel of north latitude, and of the requirements of said Commissioner that they show their true location.

And these defendants allege that the location made in 1864 as aforesaid was and is a compliance with the terms and conditions of

*Written in pencil; "corrected from 1867."

the said act of Congress, and is a good and practicable route and location, free from any engineering difficulties and easy of construction, and was made and established by the McGregor Western Railway Company, and accepted and approved by the proper legal authorities of the United States, to a point in section 19, township 95, range 40, west from which point to a point of intersection with the Sioux City and St. Paul railroad, was the only part of said line not definitely located and established.

That from such point in said section 19 to such point of intersection is a good, direct and practicable route, free from engineering difficulties and easy of construction.

That notwithstanding which the said McGregor and Missouri River Railway Company unlawfully and without authority, and in defiance of the terms and conditions of the said act of Congress and requirements of the said Commissioner, and with the intent to injure, wrong and defraud the Sioux City and St. Paul Railroad Company, and to bring within the ten and twenty mile limits of the location to be made by said company, large and valuable tracts of land in Osceola and Dickinson counties, and not within the ten or twenty mile limits of the definite location of the Sioux City and St. Paul railroad, and set apart and reserved for said road, that they might set up a fraudulent, wrongful and fictitious claim thereto annoy, harass, *rass*, injure and defraud the said defendant corporation in the fall of 1868 and spring of 1869, wrongfully, unlawfully and fraudulently made a survey of a line of railroad through Clay and O'Brien counties, as stated aforesaid
123 herein, making their pretended and fraudulent line, after the same comes within the twenty-mile limits of the Sioux City and St. Paul railroad, just so far to the north of the true located line, as that the twenty-mile limit of such fraudulent line would extend to and coincide with the north line of the State of Iowa, and include within the said limits the land up to the north line of the State, upon the *the* diagram hereto annexed marked "Exhibit A" is shown the ten and twenty-mile limits as claimed under such fraudulent survey of 1869 marked "ten-mile limit of location of 1869" and "twenty-mile limit of location of 1869."

9. That these defendants deny that the State of Iowa has ever selected the point on the south line of the State of Minnesota between the Big Sioux and the West fork of the Des — river as the terminal point of the line of railroad from Sioux City as provided by said act of Congress, but on the contrary these defendants aver that the State of Iowa, by law duly enacted, authorized the selection of the said terminal point of the line of said railroad from Sioux City as required by said act of Congress, which said last-mentioned law of the State of Iowa is set forth in Exhibit "B," hereto annexed and made a part hereof, to be made by the Sioux City and St. Paul Railroad Company, and that said selection was made by this defendant, The Sioux City and St. Paul Railroad Company, pursuant thereto as the agent of the State of Iowa, and by the authority therein conferred and powers therein delegated, and that said selection of said terminal point was duly approved by the governor of

the State of Iowa, and by the authority therein conferred and powers therein delegated, and that said selection of said terminal point was duly approved by the Governor of the State of Iowa, and by the Secretary of the Interior of the United States, and that said selection is in all respects legal, valid and binding upon all parties interested therein, and upon said State of Iowa and upon the United States.

10. That these defendants deny that the said Sioux City and St. Paul Railroad Company has constructed its said railroad as alleged in said complaint or otherwise than herein stated.

And defendants further answering aver that it has constructed its said railroad, beginning in said Sioux City and ending
124 at the south line of the State of Minnesota in full compliance with said act of Congress, and aforesaid acts of the legislature of the State of Iowa relating thereto, except not to exceed twenty-four miles thereof lying between Sioux City and Le Mars, that the length of road completed is 57.22 miles, and it has constructed its said railroad through and continuous with all the lands in controversy herein, and has constructed sufficient and all of its said railroad necessary and required to enable it to receive and entitle it to all of lands *running* to it under and by virtue of said grants among which lands to which it is so entitled, are the lands in controversy herein, and that by virtue of the premises and facts herein stated, the said lands in controversy became and of right ought to be the absolute property of this defendant, the said Sioux City and St. Paul Railroad Company.

11. That these defendants severally say that they or either of them to the knowledge or belief of the others, or either of them, do not know and have never been informed, save by the complainant's bill, and cannot set forth as to their belief or otherwise whether at the date of the congressional grant the Government lands designated by odd-numbered sections within twenty miles of either side of the line from McGregor westward, and east of the east line of Kossuth county, Iowa, had all been sold, reserved or otherwise appropriated by the United States with a few unimportant exceptions, or what amount of such odd-numbered sections had been sold, reserved or appropriated, or whether west of the east line of Kossuth county and thence west within twenty miles on either side of the line located large quantities of the Government land designated by odd-numbered sections had been sold, reserved or otherwise appropriated by the United States prior to the taking effect of the said Congressional grant, or as to whether there could be found that inured to the McGregor grant, either exclusive or inclusive of the lands in controversy, the amount of acres stated in said bill of complaint, and leaves the complainant to make such proof of the same as it may be advised is material, but these defendants allege that there was sufficient lands in the odd-numbered sections lying
125 outside of the ten-mile limits and within the twenty-mile limits of the said grant to the State of Iowa to aid in building a railroad from McGregor westward exclusive of the lands in controversy in this action not sold, reserved or otherwise appropriated, from which to select and make any and all deficiencies made

or occasioned by the sale, reservation or appropriation by the United States of any lands within said grant after the passage of the said act of Congress, May 12, 1864.

12. That these defendants admit the passage of the act of the legislature of the State of Iowa, set forth and shown in Exhibit No. "9" of complainant's bill of complaint and for greater certainty as to what was enacted therein, beg leave to refer the same to this court for the construction, interpretation and effect thereof.

13. That these defendants admit the passage of the act of the legislature of the State of Iowa, set forth and shown in Exhibit No. "10" of the said bill of complaint, and for greater certainty as to what was enacted therein, beg leave to refer the same to this court for the construction, interpretation and effect thereof.

14. That these defendants further severally say that they or either of them, to the knowledge or belief of the others or either of them, do not know and cannot say of their own knowledge whether the complainant accepted the said grant and gave and filed the bond required in the last-mentioned act, and leave the complainant to make proof thereof as it may deem material.

But these defendants allege that the railroad built and constructed by the complainant to a point of junction with the Sioux City and St. Paul railroad at Sheldon, in O'Brien county, is not built or constructed through tho counties of Clay or O'Brien, either upon or near the definitely located line of the McGregor Western Railway Company or upon the fradulently surveyed line of the McGregor and Missouri River Railway Company, but upon another and different line from either, and that the line of road constructed by the complainant, in so far as the location is concerned, is a departure from and in no manner in compliance with the terms and conditions of the said act of Congress of May 12, 1864; that said line is shown on Exhibit "A," hereto attached.

126 15. That as to whether prior to the 1st day of January, 1879, the governor of the State of Iowa certified to the Secretary of the Interior of the United States, that the complainant had completed its railroad from Algona, in Kossuth county, to Sheldon, in O'Brien county, as stated in paragraph 24 in complainant's bill, these defendants severally say that they have no information or belief. But these defendants deny that thereby the said complainants became entitled to demand and receive from the governor of the State of Iowa, and the register of the State land office patents for all or any of the lands inuring to the road from a point at the foot of Main street, South McGregor, in said State in a westerly direction by the most practicable route, on or near the 43d parallel of north latitude, to a point of intersection in O'Brien county, with the railroad running from Sioux City to the State line under the act of Congress aforesaid, which had not previously been patented to the McGregor and Missouri River Railroad Company, and deny that they became, or are entitled to demand, or receive from the said governor and register of State land office of the State of Iowa under said act of Congress patents for any land whatever.

16. That these defendants admit that the lands described in Ex-

hibit "11" of the plaintiff's were on 9th day of June, 1873, by the Commissioner of the General Land Office of the United States certified to the Secretary of the Interior of the United States as land inuring to the State of Iowa in aid of the construction of the Sioux City and St. Paul Railroad Company, and recommended that the same be approved and carried into patent, but deny that the same were wrongfully, unlawfully and mistakenly so certified and recommended.

17. That the defendants admit that on the 10th day of June, A. D. 1873, the Secretary of the Interior of the United States approved the said list certificate and recommendation, and in pursuance thereof on the 17th day of June, A. D. 1873, a patent from the United States was executed and issued to the State of Iowa for all of the said lands for the use and benefit of this defendant The Sioux City and St. Paul Railroad Company, but deny that the said
127 Secretary of the Interior disregarded the rights of the complainant, or the McGregor and Missouri River Railroad Company, or the McGregor Western Railway Company, or any other beneficiary under the trust imposed by the said act of Congress, or that the said list, certificate and recommendation were wrongfully, unlawfully and mistakenly approved, or that the patent for the said lands was wrongfully, unlawfully or mistakenly executed or issued, and deny that by any wrong or mistake the list of lands described in Exhibit "12" were patented to the State of Iowa, on the 25th day of June, A. D. 1875, or that the patent for such list was wrongfully, unlawfully or mistakenly issued. And these defendants allege, that after the location of the said McGregor and Missouri River railroad as aforesaid, and prior to the commencement of this action, this defendant, The Sioux City and St. Paul Railroad Company in due form made application to the proper officers of the United States, to have the lands appertaining to its said railroad under said act of Congress and said act of said General Assembly, set forth in Exhibits 11, 12, and 13, patented and conveyed to the said State of Iowa, in trust and for the use and benefit of the said Sioux City and St. Paul Railroad Company, and that the said application was resisted by said McGregor and Missouri River Railroad Company, but that after full hearing and examination into the merits thereof, and after hearing and considering all the proofs and allegations of said McGregor and Missouri River Railway Company in opposition thereto, the said Secretary of the Interior of the United States, by and with the advice and — conformity with the opinion of the Attorney General of the United States, did in June, A. D. 1873, decide and determine that said lands in controversy of right and according to the law and the terms and conditions of said act of Congress and said last-mentioned act of said General Assembly, belonged to this defendant, The Sioux City and St. Paul Railroad Company, and did then award said lands in controversy to the said Sioux City and St. Paul Railroad Company, and that pursuant to said decision and award of Secretary of the Interior, the proper patent, or patents, were in due form of law issued to said State
128 of Iowa for all of said lands in controversy for the use and

benefit of this defendant, The Sioux City and St. Paul Railroad Company.

18. That these defendants admit that on the 31st day of December, 1877, the governor and register of the State land office of the State of Iowa certified to the Sioux City and St. Paul Railroad Company the lands described in Exhibit "13" of complainant's bill, but deny that the governor and register of the State Land Office of the State of Iowa wrongfully, unlawfully and mistakenly refused to certify the said lands in the said three lists to the complainant, but allege that such refusal was right, lawful and proper.

19. That these defendants admit that the lands described in the lists annexed to complainant's bill of complaint, marked Exhibits "11," "12," and "13," lie within twenty miles on one side or the other of the Sioux City and St. Paul Railroad Company's line of road, but deny that the said lands lie within twenty miles of one side or the other of the line of complainant's railway or of the line of road located and approved by the proper legal authorities of the line of road contemplated by the act of Congress aforesaid approved May 12th, 1864.

That on the diagram hereto annexed, marked Exhibit "A" is shown the location, and the ten and twenty mile limits on each side of said locations and of the Sioux City and St. Paul railroad.

20. That the defendants admit the execution of the trust deed to A. H. Rice and E. F. Drake, as set out in said bill, and that the said A. H. Rice and E. F. Drake claim the interest in said lands granted and conveyed to them by such deed of trust.

21. And these defendants further jointly and severally answering to the said complainant's bill allege that in the month of January, 1866, the articles of incorporation of the Sioux City and St. Paul Railroad Company were duly signed, filed and recorded, as provided by the laws of the State of Iowa, and thereupon and thereafter the said company became and still is a corporation under the laws of the State of Iowa.

22. That in the year 1866 there was duly enacted by the General Assembly of the State of Iowa a statute which became a law
129 by the approval of the governor of said State of Iowa, on the third day of April, A. D. 1866, entitled: "An act to accept of the grant and carry into execution the trust conferred upon the State of Iowa by an act of Congress, entitled, An act for a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of a railroad in said State, the same being chapter 134 of the Laws of Iowa for 1866, and which is set forth in said Exhibit "B" hereto annexed and made a part hereof, and that thereby the lands, rights and privileges granted to the said State of Iowa, by said act of Congress, and that all the said lands and rights, franchises and privileges appertaining to the said line of railroad therein provided for from said Sioux City to the south line of the State of Minnesota, were conferred upon and granted to the defendant, the said Sioux City and St. Paul Railroad Company.

23. That within six months after the passage of said act set forth in said Exhibit "B," to wit: on the 25th day of September, A. D.

1866, the Sioux City and St. Paul Railroad Company filed in the office of the secretary of the State of Iowa a written assent and acceptance of said mentioned act.

24. That prior to the organization of said Sioux City and St. Paul Railroad Company, as stated herein, the Iowa Falls and Sioux City Railway Company, named in said bill of complaint, had under acts of Congress and of the State of Iowa obtained a grant of lands lying and being in the counties of Clay and O'Brien and adjacent counties on the south, to aid in building its line of road, and had duly surveyed and definitely fixed its line of route and had thus received a prior right to said lands as against said defendant company; and said McGregor and Western Railway Company having located and definitely fixed its line of road as far west as section 19, township 95, range 40, aforesaid, as hereinbefore stated and admitted, which facts were well known to this defendant company at and prior to the location of its own line, it became necessary and was proper and for the interest of said company to so locate its said line of road as to produce the least conflicting or overlapping of its land limits with those of said railway companies having said prior locations, and comply with the provisions of law in that behalf made and provided.

That with this object and to unite the said connection hereinafter set forth, on the 27th day of September, 1866, the Sioux City and St. Paul Railroad Company commenced the location of its line of railroad at Sioux City, in the State of Iowa, and between that time and the fourth day of October of said year it definitely located and established its line of road by surveying and staking the same upon the face of the earth from Sioux City to the south line of the State of Minnesota at the point selected by the said company, as agent of the said State of Iowa, for that purpose authorized and empowered, between the Big Sioux and the West fork of the Des Moines river, being a point in range 40, about equidistant from each of said streams; that said line is shown in Exhibit "A" hereto attached.

That prior to the location of the said line or route of road the United States had partly by an act of Congress entitled "An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands in alternate sections to the State of Alabama, to aid in the construction of a certain railroad in said State, approved March 3d, 1857," and partly by the act of Congress entitled "An act for a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of a railroad in said State, approved May 12th, 1864," being section 7 of the act set forth and shown in "Exhibit 1" of the complainant's bill, made a large and valuable grant of land to the State of Minnesota for the purpose of aiding in the construction of a railroad in said State from St. Paul and St. Anthony via Minneapolis to a convenient point of junction west of the Mississippi to the southern boundary of the State in the direction of the mouth of the Big Sioux, near which the town of Sioux City was and is situated, with which this defendant's road was expected to connect and form a continuous line; and the said

line of road was then located in the State of Minnesota to a point in township 104 in range 39 in said State, and the line and route of the said Sioux City and St. Paul railroad was fixed and deter-
131 mined in part with reference thereto, and for the purpose of making it possible and feasible to connect with said road and form a continuous line from St. Paul and Minneapolis to Sioux City, as contemplated in said acts of Congress.

25. That on or about the 10th day of July, 1867, the said Sioux City and St. Paul Railroad Company filed a map, showing the route of said road, in the office of the governor of the State of Iowa, and also in the office of the secretary of the State of Iowa, and immediately after filing of said map with the said governor and said secretary as aforesaid, the said governor affixed his official signature thereto, and filed or caused to be filed such map in the office of the Secretary of the Interior of the United States.

26. That on the 26th day of August, 1867, the Commissioner of the General Land Office of the United States acknowledged the filing of said map as being in accordance with the act of Congress, approved May 12, 1864, and by an order directed to the register and receiver of the land office at Sioux City, Iowa, withdrew from sale or other disposal all the odd numbered sections within twenty miles on each side of the said line, as shown and located upon the map filed as aforesaid, and reserved and selected the same as land inuring to the State of Iowa for the said Sioux City and St. Paul Railroad Company, and directed that the even-numbered sections within such limits be held for sale and disposed of only at the double minimum price of such public lands.

That the said order was accompanied by a map showing the ten and twenty mile limits of the said grant. That on the annexed diagram marked Exhibit "A," is shown the said ten and twenty mile limits so designated and defined by said order marked "Ten-mile limits of Sioux City and St. Paul railroad," "Twenty-mile limits of Sioux City and St. Paul railroad."

27. That at the time of the withdrawal of the said lands from sale or disposal for the Sioux City and St. Paul Railroad Company the said lands, excepting such as had been sold or upon which there were pre-emption claims or homestead entries were throughout, nearly the whole Territory included in said ten and twenty mile limits in the counties of Osceola, O'Brien, Dickinson, free and
132 unappropriated and unreserved public lands, and thereupon became and were reserved and appropriated for the purpose of aiding in the construction of the Sioux City and St. Paul railroad, and at the time of the location of the said line of the McGregor and Missouri River railway through Clay and O'Brien counties to a point of intersection with the Sioux City and St. Paul railroad, the same were reserved and appropriated lands and not subject to the grant to said road.

28. That in the year 1872 the said Sioux City and St. Paul Railroad Company commenced the construction of its railroad, and prior to the 1st day of October had constructed in Sioux City one and one-tenth miles of main track, and three-fourths of a mile of side

track for its use there, and erected in said town its depots and large and expensive machine shops, expending in such town therefor over one hundred and twenty thousand dollars, and during the same time commencing with the point of connection on the south line of the State of Minnesota, where the land-grant railroad from St. Paul and Minneapolis, provided for in the acts of Congress of March 3, 1857, and of May 12, 1864, intersected said State line, which road was then just constructed by the defendant corporation, The Sioux City and St. Paul Railroad Company, having a land-grant as stated aforesaid, and forming a continuous line therewith, the said company constructed as a first-class railroad and in full compliance with the acts of Congress, and of the act of the legislature of the State of Iowa, aforesaid, in a southwesterly direction prior to June 15, 1872, ten miles of said road, and ten miles more in like manner prior to July 15, 1872, and ten miles further in like manner prior to August 10, 1872, and ten miles further in like manner prior to September 10, 1872, and six and one-fourth miles further in like manner prior to September 25, 1872, to the village of Le Mars, and to a connection with the Iowa Falls and Sioux City railroad, then and still being run and operated by the Illinois Central Railroad Company, over which it obtained the right to run and operate to *Sioux City, a distance of twenty-four miles, and since which time it has continued to run and operate in connection with the company in the State of Minnesota from St. Paul to Sioux City.

133 29. That on the 26th day of July, 1872, Cyrus C. Carpenter, then governor of the State of Iowa, certified to the Secretary of the Interior of the United States that two sections of railroad had been constructed from the south line of the State of Minnesota southerly in the direction of Sioux City, through the counties of Osceola and O'Brien, in the State of Iowa, in accordance with the provisions of the act of Congress aforesaid, approved May 12, 1864, and that each of said sections comprised ten consecutive miles of road, in all twenty miles of road upon which the cars were then running, and the same was constructed as aforesaid and completed in a good, substantial manner in all respects as a first-class railroad, and on the 10th day of August, 1872, the said governor certified to the Secretary of the Interior in like form and manner, that another section of ten consecutive miles was in like manner constructed and completed, and on the 4th day of February, 1873, the said governor certified to the said Secretary of the Interior, in like manner and form, the construction and completion of two more sections of ten miles each of such railroad, making in all fifty miles so certified, which said road is coterminus with all the lands in controversy in this action, and the said company became the absolute and unqualified owner of all of said lands, and was thereupon entitled to have issued and delivered to it patents for the said lands.

30. That the Secretary of the Interior of the United States on the 17th day of June, 1873, caused to be made and executed and delivered to the State of Iowa a patent for all the lands described in

*This is in pencil, "and connect with its constructed track."

Exhibit "No. 11" of complainant's bill, conveying to the said State of Iowa all the said lands for the use and benefit of the Sioux City and St. Paul Railroad Company, and on the 25th day of January, 1875, the Secretary of the Interior caused to be patented to the State of Iowa in like form and manner for the use and benefit of the Sioux City and St. Paul Railroad Company the lands described in Exhibit "12" of complainant's bill, and the said State of Iowa accepted the same, and took and held the title to the same in trust for the said Sioux City and St. Paul Railroad Company; that a copy of such patents omitting the descriptions of the lands only
134 (which are shown in exhibits to said bill, and other lands not in controversy) are hereto annexed and marked Exhibits "C" and "D" and made a part of this answer.

31. That in the year 1874 there was enacted by the General Assembly of the State of Iowa an act entitled: "An act authorizing and directing the governor to certify to the Sioux City and St. Paul Railroad Company certain lands named therein," approved March 13th, 1874, whereby the governor was authorized and directed to certify to the Sioux City and St. Paul Railroad Company all the lands which were then held by the State of Iowa for the use and benefit of the said Sioux City and St. Paul Railroad Company, in accordance with the provisions of section 2 of chapter 144 of the Eleventh General Assembly, (said chapter 144 being the same statute set forth in Exhibit No. "2" of complainant's bill); a copy of said act is hereto annexed and marked Exhibit "E" and made a part of this answer.

32. That immediately thereafter the said Sioux City and St. Paul Railroad Company made application to the governor of the State of Iowa for the certificates provided for in said last-mentioned act, and on the 31st day of December, 1877, the said governor certified to the said Sioux City and St. Paul Railway Company so many of the lands described in said act as are described in Exhibit No. 13 of complainant's bill, and the said Sioux City and St. Paul Railroad Company has the full and perfect estate in all the lands in controversy in this action and is invested with the full and complete evidence of such title to so many as are in Exhibit "13" of complainant's bill and ought not to be disturbed in its quiet and peaceable enjoyment thereof.

33. That these defendants expended large sums of money in the care, management and control of said lands, and have paid large sums of money in taxes upon the same amounting to the sum of at least ten thousand dollars, which inure to and for the benefit of said lands the benefit of whomsoever shall be found to be entitled to the same, and these defendants pray this honorable court that if, upon the final hearing of this cause, your honor should find
135 that the complainant is or ought to be entitled to any portion thereof, that an accounting be made under the proper order of the court of all sums the defendants or any of them have paid or expended for or on account of any of the said lands and that the complainant pay the same with interest thereon to these defendants before receiving any portion thereof.

34. And these defendants, further answering, deny that the said complainant is entitled to any relief, or any part thereof in the said bill of complainant demanded and these defendants pray the same advantage of their aforesaid answer, as if they had pleaded or demurred to the said bill of complainant. And these defendants pray leave to be dismissed with their reasonable costs and charges most wrongfully sustained.

SIOUX CITY AND ST. PAUL R. R. CO.
ALEXANDER H. RICE,
[SEAL.] ELIAS F. DRAKE, *Trustees.*
By J. H. SWAN, *Solicitor for Defendants.*

E. C. PALMER, *Of Counsel.*

Defendant rests.

Plaintiff offered the following evidence in rebuttal:

Plaintiff offers in evidence a copy of the definite location of the Sioux City and St. Paul railway, a copy of which is certified by the Commissioner of the General Land Office under date Dec. 30, 1886, and marks the same Plaintiff's Exhibit "O."

Said map by reason of its nature and extent is incapable of production herein, but with certificate thereto is attached to the transcript. (See page 156, Trans.)

The defendant objects to it for the reason it is incompetent, immaterial and irrelevant.

Mr. MONK: You will waive the objection that it is not referred to in the abstract of title.

Mr. ARGO: Oh, yes.

Mr. HAYS: Yes.

Objections overruled.
136 Defendant excepts.
Plaintiff rests.

And the above and foregoing is a full and complete abstract of the pleadings recorded in said case and of the testimony offered and introduced upon the trial thereof, and all of said testimony was duly certified as required by law, and such certificates are attached to the transcript herein.

On the 23d of April, 1888, the court rendered the following judgment:

And now at this time, to wit, the first day of the April term, 1888, of said court, the said case having come on to be heard in open court, and the court having fully considered the pleadings and proofs and arguments of counsel in the above-entitled cause and being fully advised in the premises, finds that the plaintiff, The Western Land Company, is the absolute owner in fee simple of the premises described in the plaintiff's petition, to wit: The northeast quarter (N. E. ¼) of section one (1), township ninety-five (95), range forty-one (41), O'Brien Co., Iowa, and is entitled to the immediate possession thereof. The court further finds from the evidence that the defendant wrongfully withheld possession of said land from the

plaintiff, and that the plaintiff having dismissed without prejudice his claim for damages, ought to have and receive of and from the defendant the immediate possession of said land.

Wherefore it is considered and adjudged by this court that the counter-claim of the defendant be and the same is hereby dismissed for want of equity, and that the plaintiff have and receive of the defendant the immediate possession of the said land, together with his costs herein expended taxed at twenty and $\frac{30}{100}$ dollars, and execution issue therefor;

It is further considered, adjudged and determined that the plaintiff is the absolute owner of said land and entitled to the immediate possession thereof, and it is hereby ordered that a writ of
137 possession issue to put the plaintiff in possession of said land and to remove the defendant, and all persons claiming by, through or under him therefrom; to all of which rulings and decision and judgment the defendant by his counsel duly excepts. It is ordered that the amount of a supersed-as and appeal bond is fixed at three hundred dollars, and that the defendant by agreement of counsel made in open court, have ninety days to file his bill of exceptions.

That on the 24th day of April, 1888, the defendant filed a supersedeas and appeal bond in the sum of $300, which bond was approved by the clerk of the district court of O'Brien county, Iowa.

*Notice of Appeal.*

That on the 4th day of May, A. D. 1888, the defendant perfected his appeal to the supreme court of Iowa by serving a notice of appeal on the clerk of the district court of O'Brien county and on John S. Monk and Barrett & Calvert, attorneys for the plaintiff.

*Assignments of Error.*

Appellant says there is manifest error on the face of the record in this:

1st. The court erred in receiving in evidence, over the objection of the defendant, the acts of the legislature of the State of Iowa, for that said acts changed the terms of the grant made to the State of Iowa by act of Congress, approved May 12, 1864, by which certain lands were granted to aid in the construction of the McGregor and Western railroad, Sioux City and St. Paul railroad; that said acts are in conflict with the acts of Congress making the grant and are void by reason thereof.

2d. That the court erred in receiving in evidence, over the objection of the defendant, Exhibits A, B and C of plaintiff's testimony as shown in the abstract, and Exhibits B, C and E, maps attached to transcript, for the reason that said exhibits show or tend to show a relocation of the line of railroad and acquiesence therein by the land department without authority from Congress so to do.

138–141 3d. That the court erred in receiving in evidence, over the objections of the defendant, the patent for said land

to the State of Iowa from the General Government, and the patent from the State to plaintiff's grantor, for that said land did not pass under said grant to the State of Iowa.

4th. The court erred in holding that the plaintiff is entitled to the land in suit situated west of the point to which the line of railroad was constructed upon the line of definite location filed in General Land Office August 30, 1864, as shown by Exhibit A of plaintiff's testimony.

5th. That the court erred in holding that the changes of the constructed line from the line of defendant's location of the railroad, to which the grant inured, did not defeat the railroad company's right to the line in suit.

6th. The court erred in holding the land in suit inured to plaintiff's grantors under the said grant to the State of Iowa, made by the act of Congress, approved May 12, 1864, and the State legislature in reference thereto.

7th. That the court erred in holding the defendant's right to the land in suit under his settlement and application to take the same under the homestead act, inferior to plaintiff's claim thereto.

8th. The court erred in holding the defendant had no equities in the land in suit and dismissing his claim thereto.

JOY, HUDSON & JOY AND
D. D. McCALLUM,
*Attorneys for Appellant.*

(Here follows index to abstract omitted in printing. See general index.)

142 And on the 13th day of June, 1889, there was filed in the office of the clerk of said court by the appellee (def't in error) an amended abstract, the same being in the words and figures following, to wit:

143 In the Supreme Court of Iowa, October Term, A. D. 1889.

| | |
|---|---|
| WESTERN LAND COMPANY, Appellee, *vs.* HOWARD M. HAMBLIN, Appellant. | Appeal from District Court of O'Brien County. Honorable Scott M. Ladd. |

George E. Clark, John S. Monk, attorneys for appellee.
D. D. McCallum, Joy, Hudson & Joy, attorneys for appellant.

144 *Appellee's Additional Abstract.*

Appellant's abstract omits all mention of the offer and introduction in evidence of the grant from the State of Iowa to the Chicago, Milwaukee & St. Paul Railway Company by act of the General Assembly of February 27, 1878.

The offer and the ruling of the court admitting the evidence is found on page 33 of the transcript in these words: Plaintiff next

offers in evidence chapt. 21 of the acts and resolutions passed at the regular session of the 17th General Assembly of the State of Iowa, beginning January 14 and ended March 26, 1878, purporting to be published by authority and found on pages 18 to 21, inclusive, in the volume produced by plaintiff, being an act approved Feb. 27, 1878, entitled "An act in relation to the lands granted to the State of Iowa by act of Congress entitled 'An act for grant of lands to the State of Iowa, in alternate sections, to aid in the construction of a railroad in said State,' and to impose upon the Chicago, Milwaukee & St. Paul Railway Company the powers and liabilities mentioned in chapt. 4, title 10, of the Code," to which defendant objects the same as last above and as too general and indefinite.

(Objection overruled. Defendant excepts.)

The other acts of the Iowa legislature, as well as the act of
145 Congress mentioned in the abstract, were offered and introduced in a similar manner—that is to say, by reference, not only to the chapter of the act in question and the year in which it was passed, but in each instance the date of approval and title of the act is stated in the offer, and the record in each instance recites that the volume of laws containing said act, such act purporting to be published by authority, was produced by plaintiff indicating the pages in said volume where the act is to be found.

See transcript, pp. 29 to 33, inclusive.

The title and date of approval of said several acts as specified in the offers are the same as in the abstract of title attached to plaintiff's petition, which said abstract of title is set out on pages 2 to 4 of appellant's abstract of record.

The said act of Congress and the said several acts of the Iowa legislature are set out in the transcript, pp. 47 to 97, inclusive.

Exhibit "A" offered and introduced by appellee is also omitted from appellant's abstract. The record of the offer and reception of this exhibit in evidence is on page 33, and is as follows:

Plaintiff next offers in evidence a copy of the map of definite location of the McGregor Western Railway Company, certified
146 to by Conover, chief engineer, and George Green, president, said copy of map being certified to by William A. J. Sparks, Commissioner of the General Land Office, as being the true and literal exemplifications from the files of his office, and asks that the same be marked as Plaintiff's Exhibit "A" for identification. Said certificate is duly authenticated by the signature of said W. A. J. Sparks, Commissioner of the General Land Office, and by seal of said United States General Land Office.

To which the defendant objects on the ground that it is not properly certified.

(Objection overruled. Defendant excepts.)

Plaintiff's Exhibit "N," a deed duly acknowledged and recorded from the Chicago, Milwaukee & St. Paul Railway Company, conveying lands in controversy to plaintiff. Said deed is signed by Alexander Mitchell, president, and attested by M. W. Myers, secre-

tary, of said company, with the corporate seal of said company affixed, the signature, attestation, and seal being as follows:

"In testimony whereof the said Chicago, Milwaukee & St. Paul Railway Company hath caused these presents to be signed by its president, attested by its secretary, and its corporate seal to be hereunto affixed the day and year firstabove written.

CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY,
By ALEX. MITCHELL, *President.*

147 Attest: P. M. MYERS, *Secretary.*

[Chicago, Milwaukee & St. Paul Railway Company, incorporated 1863.]"

See transcript, pp. 107, '8.

The impression of said corporate seal is stamped upon and into the substance of the paper on which said deed is written and affixed to said instrument at the place opposite signatures of the president and secretary, as above indicated.

Duly acknowledged by said Alexander Mitchell as president of said company and Peter M. Myers as secretary thereof, the notary describing them as such officers respectively and certifying, among other things, that they are personally known to him "to be the identical persons they are above described to be," etc.

Plaintiff's "Exhibit C" is referred to in the abstract, page 23, as a map which, from its nature, cannot be abstracted.

The abstract fails to indicate the character of this map. It is the map of that portion of amended route which runs through Clay county.

The certificate which appellant's abstract states is attached to this exhibit is really a certificate attached to "Exhibit A," which exhibit is, as before stated, entirely omitted from appellant's
148 abstract, and not the certificate attached to "Exhibit C" in question, which reads as follows:

WASHINGTON, D. C., *December* 30, '86.

I, Wm. A. J. Sparks, Commissioner of the General Land Office, do hereby certify that the annexed copy of a map purporting to show the definite location of the McGregor & Sioux City railway from the east line of section 12, t'p 95 N., R. 35 W., to the southwest corner of sec. 18, t'p 96 N., range 38 W., through Clay county, Iowa, is a true and literal exemplification from the records of this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] WM. A. J. SPARKS,
*Commissioner General Land Office.*

Plaintiff's "Exhibit O" is also omitted from the abstract.

This exhibit is the decision of the Secretary of Interior, Lamar, in July 26, 1887, denying application of settlers in O'Brien county,

asking that suit be commenced in name of United States to assert title to lands in question for their benefit, and in which the honorable Secretary finds, among other things, that the company had constructed, irrespective of the forty-three miles between McGregor and Calmar, two hundred and twenty-five miles of road, for
149 which it was entitled to one million four hundred and forty thousand acres of land, and that not more than one-fourth of that quantity was found available under the grant. He therefore holds that the company was entitled to the lands in O'Brien county, whether the portion of the line between McGregor and Calmar was constructed and maintained as a land-grant road or not, if the grant in other respects was complied with, which he decides was the fact, both in regard to the location of the amended route through Clay and O'Brien counties and as to the construction of the road.

As to the claim that the patents issued by the governor to the Milwaukee Company were without authority and void, because the lands had been patented to the State for the Sioux City Company, and not for the Milwaukee Company, he refers to the decision of the United States Supreme Court, 117 U. S., 406, in which it was decided that the patent to the State named the wrong beneficiary, and the error corrected by declaring the Milwaukee Company entitled to the lands, and the Secretary holds that the mandate of the Supreme Court, followed by the decree of the circuit court made pursuant thereto, furnished to the governor ample authority for issuing the patents. (See Transcript, pp. 162–'3.)

GEORGE E. CLARK,
JNO. S. MONK,
*Solicitors for Appellee.*

150 & 151 *Reference to and Identification of Certain Maps.*

In connection with the printed abstract of record there were filed in the office of the clerk of said court certain maps, and the same are transmitted herewith in a separate bundle, marked "Maps Hamblin *vs.* Western Land Co.," and the same are made a part of the return to the writ of error herein.

And said cause was submitted to said supreme court on the foregoing record, and on the 10th day of Feb'y, 1890, said court filed its written decision of said cause (opinion), the same being in the words and figures following, to wit:

152 THE WESTERN LAND COMPANY *vs.* HOWARD M. HAMBLIN, Appellant. } Appeal from O'Brien District Court.

Scott M. Ladd, judge.

Action to recover the possession of real estate.

There was a trial by the court and a judgment for plaintiff. The defendant appeals.

Joy, Hudson & Joy, for appellant; George E. Clarke and John S. Monk, for appellee.

ROBINSON, *J.*:

The land in controversy is the northeast quarter of section one, in township ninety-five north, of range forty-one west, in O'Brien county.

The plaintiff claims ownership thereof by virtue of the following statutes and conveyances, to wit:

An act of Congress entitled "An act for a grant of land to the State of Iowa in alternate sections to aid in the construction of a
153 railroad in said State," approved May 12, 1864; chapter 144 of the Acts of the Eleventh General Assembly; chapter- 42, 16, and 58 of the Acts of the Twelfth General Assembly; chapter 96 of the Acts of the Sixteenth General Assembly; chapter 21 of the Acts of the Seventeenth General Assembly; patent from the United States to the State of Iowa; patent from the State of Iowa to the Chicago, Milwaukee & St. Paul Railway Company; deed from said company to plaintiff; also by virtue of an alleged compliance with the act of Congress cited and certain acts of the General Assembly. The defendant claims an interest in the land by virtue of an application made by him to enter it under the homestead laws of the United States and by virtue of his occupation and improvement thereof. The district court found and adjudged that plaintiff was the unqualified owner of the premises with the right of immediate possession.

I. The act of Congress approved May 12, 1864, granted to the State of Iowa "for the purpose of aiding in the construction of a railroad from Sioux City, in said State, to the south line of the State of Minnesota, at such point as the State of Iowa may select," also "for the use and benefit of the McGregor Western Railroad Company for the purpose of aiding in the construction of a railroad from a point at or near the foot of Main street, South McGregor, in said State, in a westerly direction by the most practicable
154 route on or near the forty-third parallel of north latitude until it shall intersect the said road running from Sioux City to the Minnesota State line in the county of O'Brien, in said State, every alternate section of land designated by odd numbers for ten sections in width on each side of the roads." The act provided that the lands granted should be subject to the disposal of the legislature of this State for the purpose stated and no other. It further provided that if the McGregor Western Railroad Company or assigns

should fail to complete at least twenty miles of its road during each year from the date of its acceptance of the grant the State might *resemble* the grant and so dispose of it as to secure the completion of a road on the line specified upon such terms and within such time as the State might determine. Section 5 was follows:

"And be it further enacted, That as soon as the governor of said State of Iowa shall file or cause to be filed with the Secretary of the Interior maps designating the routes of said roads, then it shall be the duty of the Secretary of the Interior to withdraw from market the lands embraced within the provisions of this act."

The grant was accepted by the State of Iowa in trust for the purposes designated by the act. In the year 1868, the McGregor
155 Western Railroad Company having failed to comply with the provisions of the granting act, the grant, so far as it was designed for the benefit of that company, was resumed by the State and conferred upon the McGregor & Sioux City Railway Company, afterwards known as the McGregor & Missouri River Railway Company. In the year 1876, the term of the grant to the last-mentioned company not having been complied with, the grant, excepting the land lying within twenty miles of the line of the Sioux City & St. Paul Railroad Company, was resumed by the State and regranted to the McGregor & Missouri River Railway Company. That company having failed to meet the requirements of the act of the General Assembly of 1876, the grant to it was resumed by the State in the year 1878 and conferred upon the Chicago, Milwaukee & St. Paul Railway Company, by which a railway was built from Algona to Sheldon, where it intersected the Sioux City & St. Paul railway in O'Brien county. A railway was thus completed on substantially the line contemplated by the act of Congress, having been constructed by the different beneficiaries of the grant named in the act of Congress and the several acts of the General Assembly of the State of Iowa. The completion of the road was certified to the Secretary of the Interior by the governor of the State on the 10th day of November, 1878. Previous to that time, to wit, in June, 1873, the General Government had patented the land in con-
156 troversy with other lands to the State of Iowa for the use and benefit of the Sioux City & St. Paul Railroad Company under the act of Congress of May 12, 1864. In the year 1879 the Chicago, Milwaukee & St. Paul Railway Company instituted an action in the circuit court of the United States for the district of Iowa, to which the Sioux City & St. Paul Railroad Company, certain trustees, and the governor and register of the State land office of the State of Iowa were made parties defendant. The purpose of the action was to recover certain lands to which the Milwaukee Company claimed title, including that in controversy, by reason of having complied with the terms of the grant to it.

The litigation extended through several years and included an appeal to the Supreme Court of the United States. Sec. 117 U. S., 406. It resulted in a final decree, rendered on the 21st day of May, 1886, which determined, among other things, that the land in question belonged to the Milwaukee Company and required the Sioux

City & St. Paul Railroad Company to convey it to that company. Appellant took possession of the land in February, 1884, and during that month he made application to enter it under the homestead laws of the United States. He built a house upon the land, made other improvements, and has resided thereon since March, 1884.

His first application to enter it seems to have been rejected
157 or withdrawn, as he made a second one in September, 1885. The evidence as to that is meagre, but since he took an appeal from something not stated we infer that it was rejected. Defendant claims some right to enter the land by virtue of a letter from the Commissioner of the General Land Office written in 1884 and a conversation had with him in 1885, but the record does not disclose what was *continued* in the former or said in the latter.

II. On the 30th day of August, 1864, the McGregor and Western Railroad Company filed in the office of the Commissioner of the General Land Office a map showing the location of its road. The western terminus of the road thus indicated was in section 19, township 95 north, of range 40 west, in O'Brien county, at a proposed intersection with the Sioux City & St. Paul railroad. The proposed western terminus was south and east of the land in controversy. On the 12th day of September, 1864, all the odd-numbered sections of public land within twenty miles of the line of the road, as shown by the map, *was* withdrawn from the market. After that time the line of the Sioux City & St. Paul railroad was so changed that it passed through the northwest corner only of O'Brien county, thereby making it impossible for the McGregor road to intersect it at the
158 point first proposed and requiring the point of intersection to be at least nine miles further north and ten miles further west. In May, 1868, the Commissioner of the General Land Office requested that the McGregor Company file a map showing the true location of its lin- through Clay and O'Brien counties to the point of its intersection with the Sioux City and St. Paul road in O'Brien county. In November of the same year the Commissioner insisted that the surveying to determine the final location be done without delay, in order that the land to be held at $2.50 per acre within ten miles of the located line might be determined in his office. In March, 1869, the McGregor Company asked permission to withdraw its map of definite location from the General Land Office and to relocate its road from the west line of range 27 to the intersection with the Sioux City & St. Paul railroad, stating that such relocation was made necessary by the change in the line of the last-named road. The permission asked was refused by the Secretary of the Interior in May, 1869, on the ground that the road having been once located and the lands of the grant having been withdrawn from market there was no authority for accepting a new location. However, in January, 1869, the McGregor Company filed in the General Land Office a map of the definite location of its road through Clay county as amended, and in September of the same year filed a similar map
159 showing the definite location of its road in O'Brien county. Thereafter the maps last filed were treated by the officers of the General Land Office in instructions given to registers and re-

ceivers and otherwise as showing the true line of the McGregor road through the counties named. The new line was north of the old from a point in the latter on the east boundary line of Clay county to the point of intersection with the Sioux City & St. Paul road in O'Brien county and contained several abrupt changes in direction. The line as finally constructed varied somewhat from the second line of location as shown by the map, the variation in places amounting to several miles, but the constructed line was more direct than the second line of location and avoided several of the changes in direction of the latter. In December, 1879, the attention of the Secretary of the Interior was called to the fact that the road of the Milwaukee Company from Algona westward was not constructed upon the line of definite location indicated by the maps of 1869. In April, 1880, the Secretary determined that the variation between that line and the one upon which the road was built was not sufficient to destroy the identity of the road; that it was constructed on the most practicable location and met the requirements of the grant, and that the State was entitled to patents for the granted lands. The location as shown and made by
160 the map of 1864 does not seem to have been considered by the Secretary in rendering his decision, but in an official letter written in 1870 by the Commissioner of the General Land Office it was treated as a temporary location as to O'Brien county, not definitely fixing the line of the road.

III. The questions raised by the pleadings are numerous, but most of those raised by the answer have been waived in this court. The matter now in controversy is stated by counsel for appellant as follows: "The vital question is, having located the line of road in August, 1864, and filed the map of definite location in the office of the Secretary of the Interior, and had the lands inuring to the grant withdrawn, based upon such location, can the line of definite location be changed by the company without the consent of Congress, and if changed does the change extend or change the land grant as fixed by the definite location of the line of road in 1864?" The land in question was not within the limits of the grant as indicated by the map of 1864, but is within the limits as shown by the maps of 1869, being less than ten miles therefrom, and is within eight miles of the road as finally constructed. It is contended by appellant that all the requirements of the law in regard to the definite location of the road were fully complied with in 1864, and that the location then made was final in the absence of consent by
161 Congress to a change, and that as such consent was not given the relocation of the road did not have the effect of extending the grant to land not included by the first location. In 1864 the line of road was surveyed, a map showing the location was filed in the General Land Office and apparently accepted, and the odd-numbered sections within twenty miles on each side of the line thus located were withdrawn from the market. In ordinary cases that would have been sufficient to locate the road definitely for the purposes of the grant. Van Wyck *v.* Knevals, 106 U. S., 360; Railway Co. *vs.* Dunmeyer, 113 *id.*, 629; Walden *v.* Knevals, 114 *id.*, 373.

But the rule contended for has no application to a case where the attempted location was not authorized by the terms of the grant. In such a case the filing and acceptance of the map could not have the effect of waiving the requirements of the granting act. In this case the act of Congress required the McGregor Company to build in a westerly direction until it should intersect the Sioux City & St. Paul road in O'Brien county. A road built on the line indicated by the map of 1864 would not have fulfilled that requirement; therefore it was not the line contemplated by the granting act. When that fact became apparent it was proper for the railway company to make a new survey and file a new map which should meet the re-
162 quirements of the grant, and when that was done and the location was approved the new line became the one to fix the limits of the land grant. It was not a relocation, but an original location within the meaning of the granting act.

IV. It is said that the right to make a second location was denied by the Secretary of the Interior. He denied permission to the McGregor Company to relocate its line of road west of range 27, but it is shown that the relocation of the line from a point forty miles or more west of range 27, to wit, the east line of Clay county, to an intersection with the Sioux City & St. Paul road in O'Brien county was permitted and approved. It is true the road as built was not altogether on the line adopted in 1869, but the variations were deemed proper by the Secretary of the Interior, who held that the line as built met the requirements of the law. There is nothing in the record to overcome the presumptions which necessarily exist in favor of the legality of the acts of the officers of the General Land Offices. The question of the legality of the location of 1869 was fully presented by the answer of the principal defendants in the case of Chicago, Milwaukee & St. Paul Railroad Company *v.* Sioux City & St. Paul Railroad Co. *et al.*, heretofore referred to, and appellee contends that its validity was necessarily affirmed in that case
163 by the *Superior* Court of the United States. The opinion of that court is found in 117 U. S., 406. It does not decide the question in terms, and for that reason is not wholly satisfactory as an authority in point. We think it is true, however, that the opinion was based in part upon the conclusion of the court that the location of 1869 was valid under the granting act of 1864.

V. Having reached the conclusion that the location of 1869 was valid and effectual to include the land in controversy in the grant, it becomes necessary to decide other questions referred to by counsel.

The judgment of the district court is affirmed.

164 And on the same day said supreme court rendered a final judgment in the following form against the appellant (pl'ff in error):

"THE WESTERN LAND COMPANY *vs.* HOWARD M. HAMBLIN, Appellant. } Appeal from O'Brien District Court.

In this cause the court, being fully advised in the premises, file their written opinion affirming the judgment of the district court.

It is therefore considered by the court that the judgment of the court below be, and it is hereby, affirmed.

It is further considered by the court that the appellant pay the costs of this appeal, taxed at $85.75, and that execution issue therefor."

165 And afterwards there were filed in the office of the clerk of said supreme court—

Petition for writ of error,
Writ of error,
Writ of error bond,
Citation, and
Assignment of error.

And the same are attached hereto in original form as a part of the return to said writ, true copies thereof having been retained and lodged in said clerk's office.

166 Supreme Court of the State of Iowa.

THE WESTERN LAND COMPANY *vs.* HOWARD M. HAMBLIN. } Petition for Writ of Error.

To the hon. chief justice of the supreme court of Iowa:

The petition of Howard M. Hamblin, defendant above named, shows that in the judgment and decision of the above-entitled cause by the supreme court of Iowa there was drawn in question the construction of certain statutes of the United States, and the said judgment and decision were against the title, right, and privilege claimed by petitioner under the same.

Your petitioner therefore prays your honor to examine the record in said suit herewith presented, and therefore allow a writ of error in said cause from the Supreme Court of the United States to the supreme court of Iowa, pursuant to the acts of Congress of the United States in such cases made and provided.

JOY, HUDSON, CALL & JOY,
*Attorneys for Petitioner.*

The writ of error as above prayed is allowed this 3d day of February, A. D. 1892.

G. S. ROBINSON,
*Chief Justice Supreme Court of Iowa.*

166½ [Endorsed:] 14469. Supreme court State of Iowa. The Western Land Company, plaintiff, *vs.* Howard M. Hamblin,

defendant. Petition for writ of error. Filed Feb'y 3, 1892. G. B. Pray, clerk sup. court, by —— ——, deputy. Joy, Hudson, Call & Joy, attorneys for petitioner.

[Stamped:] Filed Feb. 3, 1892. G. B. Pray, clerk sup. court.

167 Supreme Court of the United States.

THE WESTERN LAND COMPANY, Defendant in Error,
*vs.*
HOWARD M. HAMBLIN, Plaintiff in Error.
} Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the supreme court of the State of Iowa, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme, before you, between The Western Land Company, plaintiff, and Howard M. Hamblin, defendant, wherein was drawn in question certain statutues of the United States, and the said judgment and decision were against the title, right, and privilege claimed by said defendant under the same, a manifest error hath happened, to the great damage of the said defendant, as by his said complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 5th day of March next in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

167½ Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 4th day of February, A. D. 1892.

[Seal Circuit Court U. S., Northern District of Iowa, Sioux City.]

A. J. VAN DURYEE,
*Clerk of U. S. C. C., Northern Dist. of Iowa,*
By J. H. BOLTON,
*Deputy Clerk, Western Division.*

167¾ [Endorsed:] 14469. Supreme court State of Iowa. The Western Land Company, plaintiff, *vs.* Howard M. Hamblin, defendant. Writ of error. Filed Feb'y 5th, 1892. G. B. Pray, clerk sup. court, by —— ——, deputy. Joy, Hudson, Call & Joy, attorneys for petitioner.

[Stamped:] Filed Feb. 5, 1892. G. B. Pray, clerk sup. court.

168 Supreme Court of the State of Iowa.

THE WESTERN LAND COMPANY
*vs.*
HOWARD M. HAMBLIN. } Bond.

Know all men by these presents that we, Howard M. Hamblin, as principal, and T. A. Black and J. A. Magoun, Jr., both of Woodbury county, Iowa, as sureties, are held and firmly bound unto the said The Western Land Company in the sum of one thousand dollars, to be paid to the said obligee, its *its* successors or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our executors and administrators firmly by these presents.

Sealed with our seals and dated this 30th day of January, A. D. 1892.

Whereas the above-named Howard M. Hamblin has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the supreme court of Iowa:

Now, therefore, the conditions of this obligation is such that if the above-named Howard M. Hamblin shall prosecure his writ to effect and answer all damages and costs if *they* fail to make good *their* plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

HOWARD M. HAMBLIN,
By his att'ys, JOY, HUDSON, CALL & JOY.
T. A. BLACK.
J. A. MAGOUN, JR.

Signed and sealed in presence of—
A. L. HUDSON.
WM. L. JOY.

168½ STATE OF IOWA, } *ss:*
*Woodbury County,* }

T. A. Black and J. A. Magoun, Jr., being duly sworn, each for himself says that he is a resident of the State and is worth more than one thousand dollars beyond the amount of his debts, and that he has property in the State liable to execution to the amount of one thousand dollars and upwards.

T. A. BLACK.
J. A. MAGOUN, JR.

Subscribed in my presence and sworn to before me, the undersigned notary public in and for Woodbury county, Ia., by the above-named T. A. Black and J. A. Magoun, Jr., each for himself.

In witness whereof I have set my hand and seal hereunto this 30th day of January, 1892.

[A. L. Hudson, Notarial Seal, Iowa.]

A. L. HUDSON,
*Notary Public.*

The above and foregoing bond is approved this 3d day of February, A. D. 1892.

G. S. ROBINSON,
*Chief Justice of the Supreme Court of Iowa.*

168¾ [Endorsed:] 14469. Supreme court State of Iowa. The Western Land Company, plaintiff, *vs.* Howard M. Hamblin, defendant. Bond. Filed Feb'y 3rd, 1892. G. B. Pray, clerk sup. court, by —— ——, deputy. Joy, Hudson, Call & Joy, attorneys for petitioner.
[Stamped:] Filed Feb. 3, 1892. G. B. Pray, clerk sup. court.

169 In the Supreme Court of the United States.

THE WESTERN LAND COMPANY, Defendant in Error,
*vs.*
HOWARD M. HAMBLIN, Plaintiff in Error.

United States of America to the Western Land Company, Greeting:

You are hereby cited and admonished to appear at the Supreme Court of the United States to be holden at Washington, D. C., on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein Howard M. Hamblin is plaintiff in error and The Western Land Company is defendant in error, to show cause, if any there be, why the judgment in said writ of error should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Gifford S. Robinson, chief justice of the supreme court of Iowa, this 10th day of February, 1892.

G. S. ROBINSON,
*Chief Justice of the Supreme Court of Iowa.*

I, John S. Monk, attorney of record for the defendant in error, The Western Land Company, do hereby accept service of the above citation & acknowledge the receipt of a true copy of the same this 13th day of February, 1892.

JOHN S. MONK,
*For Def't in Error.*

169½ [Endorsed:] 14469. In United States Supreme Court. The Western Land Company, defendant in error, *vs.* Howard M. Hamblin, plaintiff in error. Citation. Filed February 15th, 1892. G. B. Pray, clerk, by —— ——, deputy. Joy, Hudson, Call & Joy, attorneys for plaintiff in error.

170 In the Supreme Court of the United States.

THE WESTERN LAND COMPANY, Defendant in Error,
*vs.*
HOWARD M. HAMBLIN, Plaintiff in Error.
} Assignment of Error.

Now comes the plaintiff in error and makes the following assignment of error and says that there is manifest error in the record and proceedings, in this:

1st. That the court erred in so construing the congressional land grant of May 12th, 1864, as to hold the plaintiff entitled to the land in suit situated west of the point to which the railroad was constructed upon the line of definite location filed in the General Land Office August 30th, 1864.

2d. That the court erred in holding that the railroad company taking under the congressional land grant of May 12th, 1864, and the acts of the State legislature in reference thereto, through which the plaintiff claims the land in suit, acquired any additional rights in the land granted by reason of the change made in the definitely located line filed in the General Land Office September 7th, 1869, without authority of Congress for making said change.

3d. The court erred in holding that the changes in the constructed line from the line of definite location did not defeat the railroad company's right to the land in suit.

4th. The court erred in holding the land in suit inured to plaintiff's grantors under the grant to the State of Iowa made by the act of Congress approved May 12th, 1864, and the State legislature in reference thereto.

5th. The court erred in so construing the homestead act of the United States, under which the plaintiff in error sought to enter the land in suit, as to hold his rights thereunder inferior to
170½ the rights of the defendant in error, derived therein under the congressional land grant of May 12th, 1864,

6th. The court erred in holding the plaintiff in error's right to the land in suit under his settlement and application to take the same under the homestead act inferior to defendant in error's claim thereto under the congressional act of May 12th, 1864.

JOY, HUDSON, CALL & JOY,
*Attorneys for Plaintiff in Error.*

WM. L. JOY,
*Solicitor for Plaintiff in Error.*

170¾ [Endorsed:] The Western Land Company, defendant in error, *vs.* Howard M. Hamblin, plaintiff in error. Assignment of error. Filed Feb'y 5, 1892. G. B. Pray, clerk sup. court, by —— ——, deputy. Joy, Hudson, Call & Joy, attorneys for plaintiff in error.

171 STATE OF IOWA, *ss:*

I, G. B. Pray, clerk of the supreme court of Iowa, do hereby certify that the foregoing is a true and correct transcript of the record

and proceedings, together with certain maps certified up and sent in original form and referred to and identified on page 150 of a case tried and determined in said court, wherein The Western Land Company (now def't in error) was plaintiff and Howard M. Hamblin (now pl'ff in error) was def't, and said maps herewith
172 transmitted are the original maps considered by said court in its decision of said cause.

And I further certify that the writ of error for the removal of said cause to the Supreme Court of the United States, petition for writ, bond, citation, and assignment of error are hereto attached and made part of the return to said writ, and that true copies thereof have been retained and lodged in my office, and this return is made in obedience to said writ of error.

Seal of the Supreme Court of Iowa.

In testimony whereof witness my signature and the seal of said court, at Des Moines, Iowa, this 24th day of February, 1892.

G. B. PRAY,
*Clerk Supreme Court Iowa.*

Endorsed on cover: Case No. 15,006. Iowa supreme court. Term No., 1042. Howard M. Hamblin, plaintiff in error, *vs.* The Western Land Company. Filed April 2, 1892.

147455 31

Office Supreme Court U. S.
FILED.
JAN 23 1893
JAMES H. McKENNEY,
CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1892.

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HOWARD M. HAMBLIN,
*Plaintiff in Error,*
vs.
WESTERN LAND COMPANY,
*Defendant in Error.*

Error to the Supreme Court of Iowa.

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## ARGUMENT OF PLAINTIFF IN ERROR, IN RESISTANCE OF MOTION OF DEFENDANT IN ERROR TO DISMISS FOR WANT OF JURISDICTION, AND MOTION TO AFFIRM.

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*JOY, CALL & JOY, For Plaintiff in Error.*

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In the argument filed by the defendant in error in support of the motion, the issues and the claims made by the respective parties to the land in suit, the location of the land with reference to the line of definite location of 1864, and the attempted re-location of 1869, and the line of constructed road to Sheldon, in O'Brien County, Iowa, are

correctly stated. Reference is also correctly made to the Congressional Act of May 12, 1864, conferring the grant upon the State of Iowa, in trust, for the purposes therein stated, and to the several acts of the legislature of the State of Iowa, in reference to said grant, and no useful purpose can be attained by repetition thereof, and we come at once to the consideration of the question presented by the motion, which is, that plaintiff in error has no such claim to or interest in the land in suit as entitles him to a hearing in this Court.

His claim to an interest in the land is under the Homestead Act of the United States, under the provisions of which he entered upon the land and made application to the local Land Office to enter the same under said Act, in 1884, and afterwards renewed said application in September, 1885, and the settlement and improvement made thereon under the said Act and the instructions of the Secretary of the Interior. (See Record, page 71–2 and 3).

The contention is that the apparent legal title which defendant in error holds was wrongfully obtained, for that the land did not pass to the grantor of defendant in error under the said grant and Act of the State Legislature of February 27, 1878, and the plaintiff in error under the Homestead Act has acquired rights in and to the said land which the officers of the Land Department have refused to recognize and protect.

*The rights claimed by plaintiff in error are under the Federal Statute. The decisions of the Supreme Court of Iowa denied the right, and upon this denial is based the plaintiff in error's right to be heard in this court.*

The doctrine is well settled in this court, that there exists in the courts of equity the power to correct mistakes and relieve against frauds and impositions, and that in casas where it is clear that the officers of the Land Department have by mistake of the law given one man the land which on the undisputed facts belonged to another, courts of equity give proper relief.

*Smelting Co. vs. Kemp, 104 U. S., 636.*
*Moore vs. Robbins, 96 U. S., 530.*
*Johnson vs. Towsley, 13 Wallace, 72.*

Equitable rights under Federal Statutes are protected as well as legal, in

*Grinnell vs. Railroad Company, 103 U. S., 739.*

It was claimad that the change of the location of the line of road, authorized by Act of Congress, defeated the claim of the railroad company to the lands that had been certified to the company as inuring to it under the line as first located, and many persons sought to make Homestead and Pre-Emption entries upon the lands. These applications were rejected by the land office and actions of ejectment were brought by the railroad company against the Homestead and Pre-Emption settlers upon these lands. The District Court held adversely to the settlers, who sued out writs of error to this Court, where their rights were heard and determined.

In *Bullard vs. Des Moines Railroad, 122 U. S., 167*, the controversy as stated on page 176, as between the Pre-Emption settlers upon land granted by Congress to the State of Iowa, and the grantees of the State. The record presented a Federal question and the rights of the parties to the lands were heard and determined upon error to this Court.

In *Ward vs. Railroad Co., 104 U. S., page 329*, the claim of plaintiff was based upon a Homestead claim, settlement and improvement upon land patented to the company; plaintiff's claim to enter by Homestead was rejected by the local Land Office; plaintiff brought suit to assert his equitable rights to the land, which were heard and determined by this Court.

The equitable rights to lands under a Federal Statute have been so often passed upon by this Court, that its jurisdiction cannot be seriously questioned.

*Defendant in error further urges that its rights to the land in suit had vested before the plaintiff in error's rights attached.*

The argument is based upon the assumption that the land had been certified to the State for it, while the record discloses that neither the Land Department or the State of Iowa, ever recognized its claim to the land in suit; that it did not fall within the grant as determined by the definite location of the line of road made in 1864, is conceded, the land being west of the point to which the line was located.

*As against the claim of plaintiff in error, defendant in error interposes its equitable claim to the land, based upon the Congressional Grant of May 12, 1864, and the Act of the State Legislature of February 27, 1878.*

This requires an examination of the Congressional grant and the State legislation in reference thereto, and the acts of the railroad companies thereunder.

The act of May 12th, 1864, belongs to that large class of Congressional grants denominated grants *in presenti*. The Court, in the case of Fremont and Mills County vs. The Burlington & Missouri River Railroad Company, 22nd Iowa, page 124, says, that while they are conditional grants *in presenti*, yet they are in the nature of floats which do not attach to any particular parcel of land until the necessary determinate lines of railroad shall have been definitely fixed. The Supreme Court of the United States has repeatedly held the same doctrine in construing similar grants.

In the case of Schulenberg et al. vs. Harriman, 21st Wallace, page 44, the Court says, "under many of the land grants the act conferring the grant provides what must be done before the grant becomes operative. The filing the map with the Secretary of the Interior under many of the grants showing the location of the line of railway is required before the grantees' rights attach to the land granted, and generally whatever the requirements of the act making the grant are, the company taking the grant must comply with the conditions imposed." The Supreme Court say in case Railroad Company vs. Fremont County, 9th Wallace, page 89, "until the line of railroad was defi-

nitely fixed upon the ground, there could be no certainty as to the particular sections of land falling within the grant; nor could the title to any particular section on the line of road vest in the company. The grant was in the nature of a float until the line was permanently fixed."

In the case of Rock Island & Pacific Railway Company vs. Grinnell et al., 51st Iowa, page 477, the Court say, "The survey of the route and the location of the line of the railway is a part of the work of construction; these are the beginning of the work, it is true, but, nevertheless, a part of the work and a very important part."

When done, the route or line of the road is fixed, definitely fixed. In Grinnell vs. the Railroad Company, 103 United States, page 742, construing the act of 1856, the Court says, "the grant of 1856 was, as has often been said, a grant *in præsenti*, and though exactly what this means has been the subject of much controversy, we think its ascertainment is not difficult. The only doubtful element of the problem is the location of the road, which, by the terms of these grants, is necessary to identify the sections granted on each side of it. Whenever this is done so that the surveyor or the officers of the Land Department can protract the line of the route on the maps of the public lands within the limits of the grant, the identity of the lands granted is mathematically attained, and the title relates back to the date of the grant; so far as lands are found in place, when this is done, not coming within the exceptions as sold or held under pre-emptions, the title, or at least, the right to this land in place is at once vested in the State or in the company to which the State has granted it."

In accord with these decisions have been the rulings of the Land Department in construing and adjusting the numerous land grants.

A properly certified map showing the definite location from South McGregor via Calmar to a point in section 19, township 95, range 40, in O'Brien county, of the line of

railroad, was filed in the office of the Secretary of the Interior on the 30th day of August, 1864.

Upon the filing of said map, a withdrawal of the land within the ten and twenty mile limits of the grant was made September 12, 1864.

By the terms of the act of May 12, 1864, Congress provided for the intersection of the two lines of road, aided by the grant in O'Brien county. This the respective companies understood at the time they accepted the grant. They were under obligation to carry out the letter and spirit of the act, but disregarded the obvious duty of agreeing upon the point of intersection in O'Brien county and locating their respective lines of road in reference thereto. The strife at once commenced to obtain a priority of right in the lands granted at the intersection of the respective lines by priority of location. For years this unseemly strife over the gift conferred by Congress to aid in the construction of the road continued until the courts held that the respective companies must recognize the principles of justice and right in the division of the grant, and that all attempts to overreach and obtain an unfair advantage by priority of location or construction of road were unavailing. The act of May 12, 1864, made it the duty of the Sioux City & St. Paul Railroad to build its road to some point in O'Brien county, and the duty was imposed on the McGregor Western Railroad Company to make an intersection with said road in said county.

Now, if each company located its line of road regardless of the rights of the other, each takes the chances of being unable to make the intersection upon the line thus adopted, and, if it is found later that the companies acted with more haste than wisdom in the location of their respective lines, they must suffer the consequences of their hasty and ill advised acts; and if repentance comes in after years, and attempts are made, even under compulsion, to comply with the terms of the grant, forfeited rights are not restored; the novelty of attempted compliance with law must be the reward.

The pathetic complaint made by appellee that the Sioux City & St. Paul Company did not locate its line of road where the McGregor Western Railroad Company attempted to compel its location is unavailing. If it was shown that there was any conference of the beneficiaries under the grant, or any attempt made to carry out the spirit of the act of Congress, any bad faith or deception practiced upon the McGregor Company, the victim of the wrong might be heard, but the record discloses only the failure of a scheme to obtain a priority of right in the land granted by a hasty and ill advised location of line. It is true as urged, that the location of the line of road to a point in section 19, township 95, range 40, in O'Brien county, was not a location to an intersection with the Sioux City and St. Paul Railroad in said county. Upon this point there is no controversy.

*The vital question is, having located the line of road in August, 1864, and filed the map of definite location in the the office of the Secretary of the Interior, and had the lands inuring to the grant withdrawn, based upon such location, can the line of definite location be changed by the company without the consent of Congress, and, if changed, does the change extend or change the land grant as fixed by the definite location of the line of road in 1864.*

These are the serious questions that confront the defendant in error. If answered in the negative, defendant in error has no right to the land in suit which lies west of the terminus of the line of 1864, and, consequently, outside of the grant to the McGregor Company. Defendant in error designates the location of the line of road in 1864 as an attempted location, but all the requirements of the acts of Congress and the State Legislature in reference to a definite location of the line of road were complied with. The line was run by the engineer of the company, staked out upon the ground, and the certificate of the officers of the company was attached to the map, which was filed in the office of the Secretary of the Interior in Sept., 1864. The following is the certificate endorsed upon said map:

McGregor Western Railway,
McGregor, Aug. 19, 1864.

We hereby certify that the line on the map to which this is attached designated by the black lines from McGregor, in Clayton county, Iowa, to Calmar, Winneshiek county, Iowa, and by a red line from Calmar through the counties of Chickasaw, Floyd, Cerro Gordo, Hancock, Kossuth, Palo Alto, Clay and O'Brien, in said state, to be a correct representation of the line of the McGregor Western Railway, and that said Railway Company hereby requests that the lands within twenty miles on either side of said line be reserved from sale under provisions of the land grant made by Congress of the United States to said Company.

In witness whereof the said McGregor Western Railway Company has caused its corporate seal to be hereto attached, and the signatures of the chief engineer, president and secretary to be hereto subscribed on the day and year aforesaid.

S. Connover,
Chief Engineer.

[seal.]

H. B. Whithouse. George Green,
President.

And upon the filing of the map so certified, the lands inuring to the grant were reserved and withdrawn from sale. What more could be done or claimed for the definite location of the line than was done and claimed for this? In this location the Railway Company acquiesced until 1869. The lands claimed by the company constructing the line of road were claimed and selected with reference to this location. The letter from the Commissioner of the General Land Office under date of October 24th, 1864, accompanying the map of definite location of the McGregor road designates the land withdrawn, and is as follows:

Department of the Interior,
General Land Office, Oct. 24, 1864.

Gentlemen:—I enclose herewith a map of that part of the McGregor Railway which passes through your dis-

trict, indicating the line of road by a red line, and the ten mile limits of the grant by pink, and the twenty mile limits by green colorings. Where grants to other roads as indicated on the enclosed diagram from range 14 to 18 inclusive, by blue color, interfere with the limits of the McGregor Railroad, such grants, of course, must be held as the limits of the latter road.

From and after the receipt of this letter and the map enclosed you are directed to withdraw from location, pre-emption or homestead entry, all odd numbered sections and parts of sections of the public lands in your district within twenty miles on each side of said road as indicated by the enclosed map, the even numbered sections and parts of sections within the ten mile limits reserved to the United States to be subject to pre-emption claim and purchase, at $2.50 per acre, and to homestead entry, subject to the restrictions in the first section of the homestead act.

Please acknowledge the receipt of this letter, stating the precise time of its reception by you, and noting the same on your records and advise this office.

I am very respectfully,

REGISTER AND RECEIVER, Des Moines, Iowa. J. M. EDMUNDS, Commissioner.

The land withdrawn was situated within the twenty mile limits upon each side of the located line. The land in suit being west of the point to which the road had been definitely located was not withdrawn from homestead entry, and unless the change of located line of road in 1869 was authorized, the plaintiff's grantor was never entitled to the land.

It is well settled by repeated rulings of the Land Department and the decisions of the courts, that when the right granted to locate a line of road has been exercised by the company upon which the right was conferred, and lands have been withdrawn based upon such location, no right or power exists to change the location of the line without the consent of Congress to the proposed change.

Under date of May 10, 1869, Secretary Cox, adhering to the well settled rule, refused to allow the McGregor & Sioux City Railway Company to change the located line of 1864 of this road, holding that after a road has been definitely located, the map thereof filed here and accepted, and the lands withdrawn, no specified authority is given whereby this department can accept another location, and, in the absence of such authority I must decline to give my approval to the map now presented. The Supreme Court in Van Wyck vs. Knevals, 106 U. S., 366, held, "the route must be considered definitely fixed when it has ceased to be a subject of change at the volition of the company. Until the map is filed with the Secretary of the Interior, the company is at liberty to adopt such route as they may deem best after an examination of the ground has disclosed the feasibility and advantages of the different lines.

"But, when a route is adopted by the company, and a map designating it is filed with the Secretary of the Interior and accepted by that officer, the route is established. It is, in the language of the act, definitely fixed, and cannot be the subject of future change so as to effect the grant except upon legislative consent. No further action is required on the part of the company to establish the same."

In Walden vs. Knevals, 114 United States. page 373, the Court, after reasserting the doctrine held in Van Wyck vs. Knevals, also cited, say, "The receipt of the map in the land office without objection being equivalent to its acceptance. Under the holdings in these cases the right of the company to the lands within ten mile limits of the grant, become fixed upon the filing of the map of definite location. No power or authority is vested in the company to change the limits of the grant by a change of line."

Attorney General Devens in 16 O. P., page 462, says, "It cannot be possible that the grantee having made his grant definite, and having had the land granted separated from the public domain can take it up and relocate it so as to appropriate other lands. The grant lost its character

of a float by the definite location; it is, therefore, necessary in adjusting the grant that it should be adjusted according to the line of definite location."

In Wood's Railway Law, 2nd Vol., page 759, after a careful review of the authorities it is laid down as a rule, that after a railroad company has filed its line of location, unless the statute confers upon it power so to do, its right of election is gone, and it cannot change its location in any essential particular where the right of eminent domain is involved.

Nevel vs. Pittsburgh, etc., R. R. Co., 2 Grants Cas., (Penn.) 137.

Buffalo, Corning & N. E. R. R. Co. vs. Pattle, 23 Barb. 21.

Atkinson vs. N. C. R. R. Co., 15th Ohio, St. 32

Moorehead vs. Little Miami R. R. Co., 17th Ohio, 352.

The acts of the railroad company in locating the line of road, the filing of the map of definite location in the office of the Secretary of the Interior, and the withdrawal of the lands based upon such location, attaches the grant to the lands within the limits as fixed by the line of road shown by the map filed, and no power or right exists to change the land grant thus fixed without the consent of Congress. Such we have seen has been the uniform holding of the courts.

And even when a change of the located line has been authorized the land grant as fixed by the line of definite location is not changed unless so provided in the act.

In Grinnell vs. Railroad Company, 103 United States, page 739, the Court held, construing the land grant act of 1856 and the amendment thereto by the Act of Congress of June 2d, 1864, that upon the filing of the map of definite location under the act of 1856, the right of the company to the land within the granted limits attached, subject to be defeated only by a failure of the company to comply with the terms of the grant. The act of June 2nd, 1864, authorized a change of location of the incompleted portion of the road so as to secure a better and more expeditious

line for connection with the Iowa branch of the Union Pacific Railroad; under the authority thus granted, the location of a portion of the line was changed, and the road built upon the new line; and upon the question whether the change of line forfeited the rights of the company to the lands upon the old line, the Court says:

"Did their construction of the road on the new line annul or defeat, without further action on the part of the United States, the title thus vested? It would have been competent for Congress to have made it a condition of the change of location, that the lands within the six mile or the fifteen mile limit of the old line, and not within the twenty mile limit of the new line, should revert to the United States, so far as the title of the company was concerned. But it did not make any such condition. If no law had been passed authorizing the change of route, it is possible the government might have reclaimed these lands as forfeited by reason of the change, to which it had not consented. But Congress did consent to the change without any declaration affecting the title already vested in the company."

In U. S. vs. Central Pacific Railroad, 118 U. S., 238, it is held, that it is well settled that the acceptance by a railroad company of a land grant, constitutes a contract by it with the United States to construct a road as required by the granting act. And under the decision we have seen that any deviation or change from the located line of road under which the lands are granted is a modification of the contract entered into with the government, and the change must be made upon such terms and conditions as the granting power may prescribe; and, if made without the consent of the government, it is a violation of the contract which subjects the company to the penalties for failure to comply with the conditions of the grant. Apply these well settled priuciples to the case at bar.

The McGregor Western Railroad Co. by its line of definite location made in 1864, fixed the limits of the land grant, but failing to build the line of road as required by

the terms of the grant and the acts of the State Legislature, the State of Iowa by act of February 27th, 1868, resumed the grant, which, under the authorities had now acquired precision and become attached to the land in place by filing of the map of definite location, and in March of the next year conferred it upon the McGregor & Sioux City Railway Company, which company subsequently, by change of name, became the McGregor & Missouri River Railway Company; the last named company having failed to complete the road further west than the town of Algona, the State resumed the grant, and by act of February 27th, 1878, conferred it upon the Chicago, Milwaukee & St. Paul Railway Company.

By this act the company was required to construct the road from Algona to Emmetsburg, thence to Spencer and thence to a point of connection with the Sioux City & St. Paul Railroad at the town of Sheldon, in O'Brien county. The towns of Emmetsburg, Spencer and Sheldon are not situated on the line of road as adopted in 1864, and are not points named in the act of Congress of May 12th, 1864, waiving for the present the question whether the State had the power to impose upon the company the additional requirements of that act, the question arises, did it confer upon the Chicago, Milwaukee & St. Paul Railroad Company any lands in addition to these granted to the McGregor Western Railway Co.

To this question there can be but one answer. Congress made but the one grant. The State conferred upon the company all that inured to it under the grant. It was left to the Railroad Company within the restrictions of the grant to locate the same by filing with the Secretary of the Interior the map of the located line, then the company's rights attached to the lands within the granted limits upon either side of the located line. The land in suit was not included; it lay beyond the point to which the line was located.

The State resumed this grant, and regranted the same. By all this state legislation nothing was or could be added

to what was conferred upon the McGregor Western Railroad Co. The State conferred all the rights it acquired, and could grant nothing more; it could resume nothing more than it granted. It required the construction of the road to Sheldon, but it had no land to give in addition to the grant as measured by the line of definite location filed in 1864.

The act did not grant any greater interest. Section 3 thereof provided that when the road was constructed to Spencer, in Clay county, the governor was to convey all lands belonging to said grant lying east of that point, and coterminous with the completed portion of said railroad, and when constructed to the point of connection in O'Brien county with the Sioux City & St. Paul Railroad, the remaining lands belonging to and embraced in said grant, appertaining to this line of road, were to be conveyed.

The land granted by this act was the old grant made certain in 1864, by filing the map of definite location as required by the act making the grant. The fact that the act of the State Legislature required the construction of the line of road provided for in the act of Congress making the grant to a point beyond the located line of 1864, the so constructing the road, did not entitle the company to any additional lands for the road so constructed.

A similar question arose in the case of the C. R. & M. R. R. Company vs. Herring, 52 Iowa, 687; the land grant act of May 15, 1856, made to the State of Iowa to aid in the construction of a railroad from Lyons City northwesterly to a point of intersection with the main line of the Iowa Central Air Line railroad near Maquoketa, thence along said line as near as practicable to the forty-second parallel, across the State to the Missouri river, was conferred by the State upon the Air Line Company, and resumed by the State in March, 1860, at which time a railroad had been constructed from Clinton, on the Mississippi river, about two or three miles south of Lyons City, westward to Cedar Rapids. When the state made the grant to the Cedar Rapids & M. R. R. Co., the fact that

the said road had been built from Clinton to Cedar Rapids was recognized. Section 6th of the act, approved March 26th, 1860, required the company to build, or cause to be built, before the first day of January, 1861, a railroad of like gauge and equal in quality to the Chicago, Iowa & Nebraska Railroad, from Pearl street, in Lyon City, to a point of intersection with the Chicago, Iowa & Nebraska Railroad within the corporate limits of the city of Clinton, and to operate the same in close connection with that road, and that no lands should be certified to the Cedar Rapids & Missouri River Railroad Company until the requirements of said section had been complied with. The Court says, "One of the conditions of the grant made by the State was that the Cedar Rapids Company should construct the Lyons plug. This was done and the plaintiffs insist they are entitled to lands therefor. We think not, for the reason that no lands were granted to the company for this purpose." The act of Congress provided the Air Line road should be built from Lyons City; the Air Line Company filed its map of definite location, commencing its road at that point; the land grant was located and made definite by the filing of said map. A change in the located line was authorized and the road built from Lyons City to a connection with the Iowa & Nebraska Railroad at Clinton, and though the building of the Lyons plug was authorized, and required by the act of the State Legislature, the company was entitled to no land therefor.

So in the case at bar; the company was required by the act of the State Legislature to build to an intersection with the Sioux City & St. Paul Railroad at Sheldon, in O'Brien county; the terminus of the located line was on section 19, township 95, range 40.

The act of the State Legislature fixed the point to which the road must be built, but it gave no additional lands therefor. It could not enlarge the grant as fixed by the filing of the map of definite location, and the land in suit after the building of the road to Sheldon remained as before, outside of the limits of the grant.

*The Land Department never recognized the rights of the Chicago, Milwaukee & St. Paul Railway Company to the land in suit, and never certified it to the State as inuring to said company under the said grant.* By mistake and without any authority or right so to do, the said land was certified to the State as inuring to the Sioux City & St. Paul Railroad Company under its grant. Nothing can be claimed for the action of the Department as sustaining defendant's in error claim to the land in suit. The action of the Land Department is adverse to the claim that the land belonged to the defendant's in errors grantor; and the courts have held that the said land did not inure to the Sioux City & St. Paul Railway Company.

There is no presumption arising from the action of the Department for the plaintiff in error to overcome, and nothing giving the defendant in error any apparent title to the land. The decision of the Supreme Court settled the question that the land in suit was erroneously certified to the State for the use and benefit of the Sioux City & St. Paul Railroad Company. This question has been settled by a court of competent jurisdiction and is no longer an open question.

The certification of the land in suit to the State of Iowa as inuring to the Sioux City & St. Paul Railroad Company was an erroneous and void act of the officers charged with the administration of the grant, and conferred no interest in or right to the said land upon the company.

The claim of the Chicago, Milwaukee & St. Paul Railroad Co., upon which the grant was conferred in 1878, years after the land had been certified to the State, was based upon the claim that the certification was a nullity, and so this Court must have found; and as the land was wrongfully certified to the State as inuring to a company which was not entitled thereto, the court after hearing the respective claims holds, and so decrees, that as between the respective litigants the Chicago, Milwaukee & St. Paul Railroad Company is entitled to the land in suit. To this litigation the plaintiff in error was a stranger. His

equitable claim to the land under the the homestead act and instructions of the Secretary of the Interior authorizing a settlement thereon, have not been heard, save in the case at bar; and as he neither claims through or under any of the parties to the suit in which those questions were settled, he is not estopped or bound by the decision therein.

The defendant in error must show under the issues, a legal title to the land in suit; it was not certified to the State for its grantor; the Department has not held that it inured to it under the grant.

Defendant's in error claim and the claim of its grantor thereto is based upon a decree in a suit to which appellant was not a party and in which his rights were not determined.

Wherein does plaintiff's in error right to assert an equitable claim to this land wrongfully certified to the State, differ from the claim made by the railroad company under which defendant in error claims? In each case the claim is an equitable one; both assert, that the certificate wrongfully made to the State conferred no interest in the land upon the Sioux City & St. Paul Company; so far as the claim of that company is concerned, the contention of plaintiff in error and the Chicago, Milwaukee & St. Paul Company are identical, and had he been a party to that suit, so far, they would have made common cause, against the illegal and wrongful certification of the land; each, though acquiring an interest after the certification of the land to the State, could be heard to assert whatever right he or it claimed to the land so illegally and wrongfully certified, for the reason that the illegal and unauthorized certification was a nullity.

Having obtained a decision upon this question, in which their interests are indentical, the land in suit, which had not been conveyed to the Sioux City & St. Paul Railroad Company, is government land. Upon what principle can it be urged that appellant shall not be heard to deny that the land fell within the limits of the grant of the Milwau-

kee Company? The Department has never held that it did; no officer charged with the duty of administering the grant has so decided.

To so hold would clothe, what the Courts have held to be a void and unlawful certification, with more of potency than an authorized act of the Department. As between the companies the Court held the Milwaukee Company entitled to the land in suit, and having thus obtained the title under the decree, when it attempts to assert its rights as against the plaintiff in error no question of estoppel arises; and in this, as in other suits where questions of title arise, the burden is upon the plaintiff in the Court below to show each link in the chain of title, and when the proof discloses that it rests upon a decree of Court, all persons who had an interest in the land, legal or equitable, are proper parties to the suit; all have a right to assert their respective claims thereto, and ignoring the rights of the plaintiff in error, who was in actual possession of the property under his homestead claim, and trying the question of title between the railroad companies, could not deprive him of his day in Court, or prevent his showing that the defendant's in errors grantor never acquired an interest in the land in suit.

Even had the officers of the Land Department certified the land in suit to the State for the benefit of the Milwaukee Company, their decision would not be conclusive. Kansas City & C. R. R. Company vs. Attorney General, 118 United States, 682.

In Moore vs. Robins, 96 United States, 535, in reference to the decision of the officers of the Land Department, the Court say, "As to facts on which their decision is based in the absence of fraud or MISTAKE, that decision is conclusive, even in courts of justice, when the title afterwards comes (collaterally) in question. But in this class of cases (a bill to determine the right of two claimants), as in all others, there exists in the courts of equity the jurisdiction to correct MISTAKES, to relieve against frauds and impositions, and in cases where it is clear that

those officers have, by mistake of the law, given to one man land, which, on the indisputed facts, belonged to another man, to give appropriate relief."

St. Paul Railroad vs. Winona Railroad, 112 U. S., 720.

Shepley vs. Cowen, 91 U. S., 330.

Moore vs. Robins, 96 U. S., 530.

Sparks vs. Pierce, 115 U. S., 408.

Defendant in error's argument is based upon the assumption that it had acquired an interest in the land in suit prior to the time plaintiff in error acquired an interest by reason of his settlement and application to enter the same under the homestead act.

This claim we have seen is unfounded; the decree in the Supreme Court was not rendered until March, 1886, and the patent executed after the decree was rendered was not made until the 27th day of September, 1886. Plaintiff in error applied to enter the said land in 1884 under the homestead act; the certifying the lands to the State as inuring to the Sioux City & St. Paul company was an error, so this Court held in R. R. Co. vs. R. R. Co., 117 U. S., 406. It did not invest the company for whose benefit it was certified, with title; it was a nullity.

And as defendant in error rests its claim upon the rights of the Milwaukee Company to the land in suit, where no action of the Department certifying the title to the company has been had, a compliance with the grant must be shown.

In this way only could the company become entitled to the land in suit. The record discloses that the grant was made to aid in the construction of a railroad from a point at or near the foot of Main street, South McGregor, in said state, in a westerly direction by the most practicable route on or near the 43d parallel of north latitude, until it shall intersect the road running from Sioux City to the Minnesota line, in the county of O'Brien.

It also shows that portion of the line from McGregor to Calmar was not constructed, as regarded by either State or company, as a land grant road. It was clearly the in-

tention of Congress, and the act so provides, that the aid granted should be applied to the construction of the entire line of road.

Attorney-General Williams, in an opinion of December 26, 1872, says: "It was not the intention of Congress to authorize the issue of patents for any of the lands lying beyond the point to which in the process of construction either road should by sections of ten consecutive miles be from time to time completed, but, on the contrary, that the intention was that such lands remain as security for further construction by the road, and also, as inducement to the railroad companies to push their work with vigor. Certainly it was not contemplated that the grant for the benefit of either road should be exhausted while a large portion of such road should remain to be constructed."

The Circuit Courts of the United States in the controversy between the two companies claiming under the land grant act of May 12, 1864, before referred to, held as a matter of course the intent of Congress to give the lands to one or both roads was dependent upon the performance of the condition of the grant; in other words, upon the construction of the roads according to the terms of the act of Congress and the legislative will of the trustee.

The Supreme Court of the United States in U. S. vs. Burlington & Winona River R. R. Co., 98 U. S., 340, construing a similar land grant act, says: "The grant was made to aid in the construction of the entire road, and not merely a portion of it."

*The land in suit was reserved by the terms of the act of the State Legislature and the patent to the Milwaukee Company.*

The act of the State Legislature granting the land to the Chicago, Milwaukee & St. Paul Railway Company, Chapter 21 of the Laws of the 27th General Assembly, approved February 27, 1878, in the eighth Section thereof expressly reserves from the operation of the grant all lands belonging to the grant, which have been entered

upon and occupied in good faith, pursuant to the Preemption or Homestead Laws of the United States.

Section 8 of said Act is as follows:

"The acceptance of the provisions of this Act shall be deemed a release by the company accepting the same, of all claims to unpatented lands selected for and belonging to the original grant, which have been entered and occupied in good faith, pursuant to the provisions of the preemption or homestead laws of the United States; and upon the making of the final proof of the occupation and improvement now required by law, and of good faith, as aforesaid, to the satisfaction of the register of the state land office, the governor is hereby authorized to execute patents for such lands to persons entitled thereto; and also all lands embraced in said grant which have been patented by the governor, under the provisions of Section 7, of Chapter 58, of the laws of the twelfth general assembly; and said lands so patented are hereby expressly reserved from the operation of this act, and the title of said patentees, and their assigns, to the lands so patented, are hereby ratified and confirmed."

By the terms of the grant the land in suit having been settled upon under the homestead act never passed to the Milwaukee Company.

In harmony with the provisions of this grant of the State Legislature, was the reservation in the patent from the State of Iowa to the Milwaukee Company, dated the 27th day of September, 1886. (Exhibit "M" of Record, pages 37 to 39.) The granting clause of the patent reserves all rights of the settlers upon the lands. The language is, "Reserving forever all rights of settlers upon these lands." The land claimed by the plaintiff in error was neither granted to the Milwaukee Company, or conveyed under the patent from the state; by the decisions of the court it is wrongfully certified to the Sioux City & St. Paul Company, and was neither granted nor conveyed to the Milwaukee Company.

Defendant in error takes nothing by reason of the wrongful certification of the land in suit by the State of Iowa to the Sioux City & St. Paul Company. The certification is held to be an error and the land did not inure to the company for whose benefit it was certified, as we have seen courts grant relief against such mistakes and errors of the Land Department.

The Milwaukee Company in the suit between the railroad companies claimed nothing under or through the Sioux City & St. Paul Railway Company; its claims to the lands were adverse to that of this company, and the decree gave it no rights by reason of any acts done or rights obtained by the Sioux City & St. Paul company.

The plaintiff in error's rights under his homestead settlement are reserved by the terms of the grant conferred upon the railroad company by the act of the State Legislature; the patent from the State of Iowa to the Milwaukee Company also reserves his rights.

With a record properly before the Court disclosing these facts, we confidently trust that the Court will hold the plaintiff in error entitled to a hearing.

Respectfully submitted,

W. L. JOY,

For Plaintiff in Error.

IN THE

# SUPREME COURT OF THE UNITED

OCTOBER TERM, A. D. 188[illegible].

HOWARD M. HAMBLIN,
*Plaintiff in Error,*
*vs.*
WESTERN LAND COMPANY,
*Defendant in Error.*

Error to [illegible]

COPIES OF MOTION TO DISMISS AND AFFI[illegible]
OF NOTICE OF SUCH MOTIONS, AND B[illegible]
OF DEFENDANT IN ERROR, IN SUP[illegible]
PORT THEREOF.

JOHN S. MONK,
For Defendant in [illegible]

BARNARD & COUTHOUY, PRINTERS, SYRACUSE.

Copies of motion to dismiss for want of jurisdiction and of motion to affirm and of notice of said motions, served on counsel of plaintiff in error.

IN THE SUPREME COURT OF THE UNITED STATES. OCTOBER TERM, A. D. 1892. TERM NO. 1,042.

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|---|---|
| Howard M. Hamblin,<br>*Plaintiff in Error,*<br>*vs.*<br>Western Land Company,<br>*Defendant in Error.* | *In Error to the Supreme Court of the State of Iowa.* |

MOTION TO DISMISS FOR WANT OF JURISDICTION, AND MOTION TO AFFIRM.

Comes now the defendant in error by its counsel appearing in that behalf, and moves the court to dismiss the writ of error in the above entitled cause for want of jurisdiction; because the judgment or decree, to review which the said writ of error was taken out, is the judgment or decree of the highest court of one of the United States, to wit: the Supreme Court of the State of Iowa, and that, in the decision of said cause by said state Supreme court there was not drawn in question the validity of a treaty or statute of, or of an authority exercised under the United States; nor was there in said decision drawn in question the validity of a statute of, or an authority exercised under any state on the ground of their being repugnant to the constitution, treaties or laws of the United States; nor was the said decision against any title, right, privilege or immunity specially set up or claimed by the plaintiff in error under the constitution or any treaty or statute of, or commission held, or authority exercised under the United States.

And the said defendant in error, by counsel as aforesaid, also moves the court to affirm said judgment or decree, to review which said writ of error was sued out, because, although the record in said cause may show that this court had jurisdiction in the premises, it is manifest that said writ of error was taken out for delay only, and that the question on which jurisdiction depends is so ~~trivial~~ *frivolous* as not to need further argument.

JOHN S. MONK,
*Counsel for Defendant in Error.*

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1892.

Term No. 1,042.

Howard M. Hamblin,
*Plaintiff in Error,*
*vs.*
Western Land Company,
*Defendant in Error.*
} *In Error to the Supreme Court of the State of Iowa.*

COPY OF NOTICE OF MOTION TO DISMISS FOR WANT OF JURISDICTION AND OF MOTION TO AFFIRM.

*To Wm. L. Joy, Solicitor for Plaintiff in Error, and Joy, Hudson, Call and Joy, Attorneys for Plaintiff in Error.*

GENTLEMEN: Please take notice that on Monday, the 23d day of January, 1893, at the opening of the court, or as soon thereafter as counsel can be heard, the motions of which the foregoing are copies, will be submitted to the Supreme court of the United States for the decision of said court thereon. Annexed is a copy of the brief and argument to be submitted with the said motions in support thereof.

JOHN S. MONK,
*Counsel for Defendant in Error.*

IN THE

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1892.

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HOWARD M. HAMBLIN,
*Plaintiff in Error,*
*vs.*
WESTERN LAND COMPANY,
*Defendant in Error.*

Error to Supreme Court of Iowa.

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## BRIEF OF DEFENDANT IN ERROR, IN SUPPORT OF MOTION TO DISMISS AND AFFIRM.

This was an action at law to recover real property, brought by the Western Land Company, defendant in error and plaintiff below, against Howard M. Hamblin, plaintiff in error and defendant below. The defendant below answered, as he was permitted to do by the Iowa code, alleging matter of equitable defense and counter-claim, asserting equitable ownership in himself. The decree dismissing defendant's counter-claim, adjudging title in plaintiff, and awarding to it a writ of possession, was affirmed by the Iowa Supreme court. To reverse this judgment the defendant below brings the case here on writ of error.

*Nature of Company's Title.* The title of the company is founded upon grants by act of Congress to the

State of Iowa to aid in the construction of a certain railroad in said state, and by certain acts of the Iowa legislature granting the land to grantors of defendant in error; also upon patents issued in pursuance of these grants respectively, from the general government to the state, and from the state to the Chicago, Milwaukee and St. Paul Railroad Company, by which company the land was conveyed to defendant in error.

*Roads Aided by the Grant.* By the act of May 12, 1864, Congress made a grant of land to the State of Iowa to aid in the construction of two railroads in that state.

One of these, which was a line from Sioux City, Iowa, in a northerly direction to the Minnesota state line, has since been known as the Sioux City and St. Paul Railroad.

The other, beginning at a point at or near the foot of Main street, in South McGregor, Iowa, was to extend in a westerly direction by the most practical route on or near the forty-third parallel to a point of intersection in O'Brien county with the first mentioned road. This line was then known as the McGregor Western, the grant in aid of which, it will appear, finally devolved upon the Chicago, Milwaukee and St. Paul, grantor of defendant in error.

*Granting clause.* The grant was of every alternate section, designated by odd numbers, for ten sections in width on each side of said roads. In case it should appear, when the routes were definitely fixed, that the United States had sold any part of the lands granted, or that a right of pre-emption or homestead had attached thereto, or that the same had been reserved by the United States for any purpose, then it was to be the duty of the Secretary of the Interior to cause to be selected from the odd sections within twenty miles a quantity of land equal to those sold, reserved or otherwise appropriated within the ten-mile limits. The lands thus selected to be held by the state for the use and benefit of the companies building the roads.

*Evidence upon which Secretary of Interior was to act in issuing patents to the state.* The act further provided that when the governor of Iowa should certify to the Secretary of the Interior that any section of ten consecutive miles of either of said roads had been completed in a good, substantial and workmanlike manner of first-class railroad, then the Secretary of the Interior should issue patents to the state for one hundred sections of land for the benefit of the company having completed the ten-mile section of railroad; and so, from time to time, patents were to be issued for one hundred sections on the completion of each ten-mile section of road until the whole road was completed.

*Conditions of grant.* It was also provided that if the McGregor Western Company should fail to complete at least twenty miles of its road during each and every year from the date of acceptance of the grant, then the state might resume the grant, and so dispose of the same as to secure the completion of the line upon such terms and within such time as the state shall determine. And that, if the roads were not completed within ten years from their several acceptance of the grant, the lands granted and not patented should revert to the State of Iowa; and, should the state fail to complete said road within five years after the expiration of the ten years, then the lands undisposed of were to revert to the United States. As soon as the governor should file, or cause to be filed with the Secretary of the Interior, maps designating the routes of said roads, it was made the duty of the Secretary of the Interior to withdraw from market the lands embraced within the provisions of this act.

*State Legislation by which grant was accepted and finally conferred upon Chicago, Milwaukee and St. Paul Railway Company.* By Act of April 20, 1866, the state accepted the grant in aid of the McGregor and Western enterprise. And, by acts of February 27th and March 31, 1868, the state resumed the grant from that company and conferred it upon the McGregor and Sioux City Company—the name of which was afterwards changed to "McGregor and Missouri River Railroad Company." On the 15th day of March, 1876, by act of the legislature, approved on that day, the state resumed the grant to the McGregor and Sioux City Company, and re-conferred it upon the same company, subject to new conditions. This grant was never accepted.

February 27, 1878, the Iowa General Assembly resumed the grant from the McGregor and Missouri River Railroad Company and conferred it upon the Chicago, Milwaukee and St. Paul Railroad Company, by whom the lands in question were conveyed to the Western Land Company. (See offer of in evidence, Rec., 99 and 100.)

It will not be disputed that whatever title the state acquired by the Congressional grant was by this act conferred upon the grantors of defendant in error, and hence there seems to be no occasion to set out the act here.

**Facts Respecting Definite Location of Route by McGregor Western and its Successors.**

*Attempted location of 1864.* On August 30, 1864, there was filed in the General Land Office a duly authenticated map of the location of the McGregor Western Railroad from Main street, in South McGregor, to a point in section 19, township 95, range 40, in O'Brien county, where it was then expected a junction would be formed with the Sioux City and St. Paul Railroad. Exhibit A. (Rec., 100.)

*Failure of this location to conform to Act of Congress.* In July, 1867, the Sioux City and St. Paul Railroad filed in the General Land Office, a map of its location. (Exhibit O, see Rec., 97.)

The line indicated on this map, passing through only the north-western corner of O'Brien county, was, at its nearest point, about seventeen miles north-west of the western terminus of the McGregor Western, as located in 1864. On the establishment of this line, it became apparent that the line of the McGregor Western, as located in 1864, did not comply with the act of Con-

gress. The act required the latter company to construct its road, by the most practical route, to a point of intersection with the Sioux City and St. Paul, in O'Brien county. The line, as located in 1864, did not so connect with that road, nor would it, if extended westward in the direction of the general route, have intersected the line of the Sioux City and St. Paul, in that county, as the act required.

*Directions by Commissioner of the General Land Office to change location so as to conform to act of Congress.* In a letter dated May 13, 1868, [Exhibit D, Record, page 18], the Commissioner of the General Land Office, called the attention of the Governer of Iowa to the necessity of having the "true point of intersection in O'Brien county, in accordance with the statute," and requests the filing at an early day of a duly authenticated map, showing the true location through Clay and O'Brien counties to the point of intersection with the Sioux City and St. Paul. And in October of the same year, [Exhibit E, page 23], the Commissioner writes to D. C. Shephard, the company's civil engineer, having in charge the relocation of the line through Clay and O'Brien counties, calling his attention to the requirements of the act, respecting the filing of the map of location of the road through Clay and O'Brien counties, to a point of intersection with the Sioux City road. In the same letter he incloses to Mr. Shephard a diagram showing the located line of the McGregor Western road, to the eastern boundary of Clay county, and of the proposed line of said road through Clay and O'Brien counties to the point of intersection in the latter county.

On November 3, 1868 (Exhibit D, Rec., page 19) he addressed to Mr. Shehpard the following letter:

"I am in receipt of your letter of the 27th ult., asking for further instruction as to the point of intersection of the McGregor Western Railroad with the Sioux City and St. Paul Railroad, in Iowa. In answer I have to state that the act of May 12, 1864, expressly states that the McGregor Western Railroad shall intersect the road running through Sioux City to the Minnesota line, in the county of O'Brien, which, according to the located line of the last named road, the point of intersection will be at the north-west corner of O'Brien county. In regard to your proposition to delay the survey till spring, I have to request and insist that the work be commenced immediately, in order that this office may determine, by sectionized limits, the lands to be

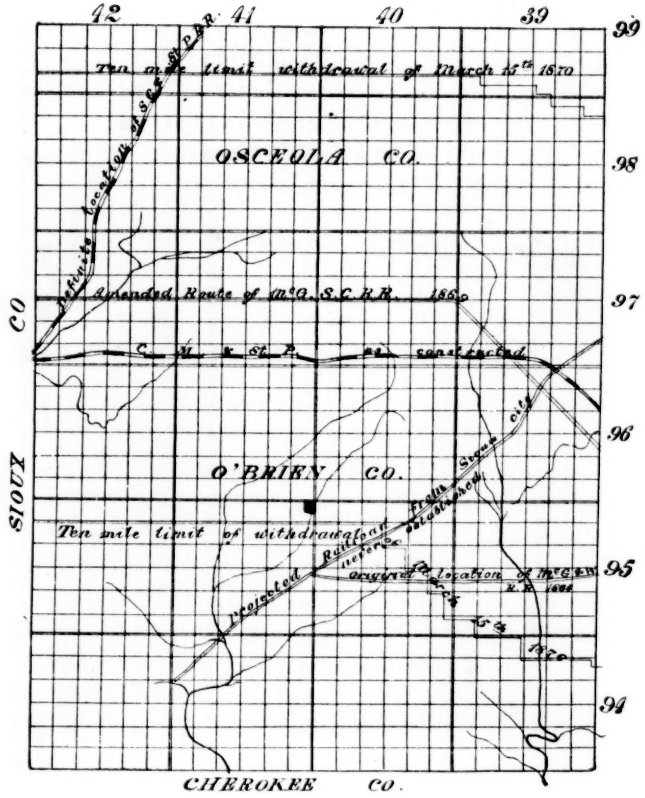
held at $2.50 per acre, within ten miles on each side of the located line running through Clay and O'Brien counties, to the point of intersection."

*Modification of Route to Conform to Requirements of Land Department and of Act of Congress.* In accordance with what Secretary Schurz, in his decision of April 9, 1880, styled the imperative demand of the land department, the line was relocated from the eastern boundary of Clay county to the true point of intersection with the Sioux City road in O'Brien county. The map of the corrected line, from the east line of Clay county to the south-west corner of section 18, township 96 north of range 38 west, on the east line of O'Brien county (Exhibit C, Rec., 16, 17 and 101), was filed January 27, 1869.

September 2, 1869, a map of the location, from the point last named to an intersection with the Sioux City road at Sheldon, O'Brien county, was filed. (Exhibit B, Rec., 15.) These maps were each duly authenticated by the officers of the company, and by certificates indorsed thereon by the governor of Iowa, and have ever since been recognized in connection with the line east of Clay county, by the land department, as showing the true line of definite location from McGregor westward to O'Brien county.

*Locus in Quo.* The tract involved is situated in what is known as the overlapping limits of the two roads. It is the north-east quarter (N. E. ¼) of section one (1), township ninety-five (95), range forty-one (41). Below will be found a map of O'Brien county, on which is correctly represented the relative location of the line of route attempted to be established in 1864; the amended route established by the *McGregor and Sioux City Railroad Company*, then owner of the grant, to the McGregor Western in 1869, to a point of intersection with the

Sioux City and St. Paul Railroad and the line of constructed road; also the relative location of the tract of land in controversy in this suit with reference both to original and amended routes. It was impracticable to attach the maps from which this was made up to the record, but they are identified by unmistakable reference in the record as the maps offered in evidence. They were filed here and in the State Supreme court with the record and made a part of the return to the writ of error by the clerk. (Rec., 102.)


42
41
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39
99
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97
96
95
94
Ten mile limit withdrawal of March 12th 1870
OSCEOLA CO.
Approximate location of U.S.S.P.R.R.
Amended Route of M.&N.W.R.R. 1869
C. M. & St. P. as constructed
O'BRIEN CO.
Ten mile limit of withdrawal
Projected Railroad reserve
Sioux City
Approximate location of M.&N.W.R.R. 1868
CO
SIOUX
CHEROKEE CO.

The tract in dispute is colored ● . It will be seen that it is within ten miles of the amended route and within a like distance of the line of constructed road, and outside of the ten-mile limits of the Sioux City and St. Paul railroad as definitely located, but within the twenty-mile or indemnity limits of the line of definite location of the last mentioned road.

## Withdrawals of Land Within Granted and Indemnity Limits from Entry.

*Original Order of Withdrawal.* On September 12, 1864, the lands within the place and indemnity limits of the McGregor Western, as indicated by the map then on file, were withdrawn from market by the land department.

*Modifications of Orders of Withdrawal to Conform to Amended Route.* By letter of February 4. 1869 (Rec., 36), the Commissioner of the General Land Office notified the register and receiver of the filing of an authenticated map of definite location through Clay county, Iowa, inclosing a diagram of place and indemnity limits, and directing the local officers to withhold from sale or other disposal all odd numbered sections within the place and indemnity limits indicated on said diagram.

By letters of March 15, 1870, and May 11, 1870 (Rec., 36 and 37), from the Commissioner to the local officers, the latter were advised that the line of road running through O'Brien county was not definitely fixed at the time of issuing instructions of October 24, 1864.

With the letter of March 15th was transmitted a diagram showing the amended line through O'Brien county to the point of intersection with the Sioux City and St.

Paul railroad, and also the ten and twenty-mile limits defined by said amended line.

## Facts Respecting Construction of Line.

It will be remembered that the *certificate* of the *governor* of Iowa to the construction of railroad in continuous sections of ten miles each, was the authority upon which, under Act of Congress, *patents* were to be issued by the Secretary of Interior to the state.

*Action of Governor of Iowa.* The Governor of Iowa certified to the Secretary of the Interior as follows:

On December 5, 1870, to the completion of one hundred and eighty-two and two tenths miles extending from McGregor to Algona, Kossuth county, Iowa.

On November 30, 1878, to the completion, in a good, substantial, workmanlike manner, etc., of a railroad from Algona in Kossuth county, Iowa, "in a westerly direction, by the most practical route on or near the forty-third parallel, north latitude, to the town of Sheldon, in the county of O'Brien, in this state, which town is on the line of the Sioux City and St. Paul Railroad."

The governor further certifies that "said railroad, thus constructed, is a part of a railroad from a point at or near the foot of Main street, South McGregor, in the State of Iowa, in a westerly direction, by the most practical route at or near the forty-third parallel, north latitude, to a point of intersection with a road from Sioux City to the Minnesota state line, in the county of O'Brien, in said state, as contemplated in said Act of Congress, approved May 12, 1864." He also certifies that the whole of said last mentioned railroad is now completed and in running order. (Rec., 23 and 24.)

## Acceptance by Secretary of Interior of the Road as and for a Compliance with Conditions of Grant.

On April 9, 1880, the question as to the compliance with the granting act by the Chicago, Milwaukee and St. Paul Railroad Company, in the construction of its road, came before the Secretary of the Interior, on the

application of the state for patents for lands not here in controversy.

By the commissioner's letter of December 19, 1879, the attention of the secretary was directed to the fact that the constructed road from Algona westward to Sheldon was not built upon the corrected line of location indicated by the map filed in 1869. And, on January 10, 1880, a further report was made by the commissioner to the secretary, stating additional facts relative to the subject-matter.

These reports having been laid before the attorney general, and his opinion upon the question involved having been duly considered by the honorable secretary, that officer, after clearly and distinctly recognizing the relocation of 1869 through Clay and O'Brien counties as being the *true location*, held:

1st. That on the facts established by the evidence submitted to him, the *deviation* of the road, as constructed, from the corrected line of definite location, was necessary and proper, in order to avoid engineering difficulties presented by the line of definite location.

2d. That the *deviation* was not sufficient to destroy the identity of the road to aid which the land was granted.

3d. That the construction of the road on the land finally adopted *was a substantial compliance* with the terms of the granting act, and entitled the state to the patents. (Rec., 20–22.)

## Facts regarding Issuance of Patents for the Lands in Controversy by the Department to the State.

On account of the prior location and construction of its line through the lands in controversy, the Sioux City Company laid claim to all of the overlapping land. It claimed, not only the lands within the granted and joint indemnity limits of the two roads, but also the lands within the granted limits of the Milwaukee Company,

and outside of the granted, but within the indemnity limits of the former. By decision of February 11, 1873, the Secretary of the Interior, reversing the decisions of the Commissioners of the General Land Office, sustained this claim to the full extent.

All of the lands *including the tract here involved* were accordingly patented to the state under date of June 17, 1873, and January 25, 1875, for the use and benefit of the Sioux City Company. (Exhibit H., Rec., 27, 28.)

**Litigation between the two Companies and the Result.**

March 1, 1869, the Chicago and Milwaukee Company filed its bill in the United States Circuit court for the district of Iowa, making the Sioux City Company, also the governor of Iowa, and the register of the state land office, defendants therein, and claiming title to an undivided half of the lands within the overlapping limits of the two roads, and praying for a partition. The suit was hotly and vigorously contested at every point. Every objection of any consequence to the title of the Milwaukee Company now insisted upon by appellant was urged upon the court in that case.

On January 20, 1882, an elaborate opinion was filed by Judge Love, affirming the following propositions:

1. That, until the Sioux City and St. Paul Railroad Company was located, it was impossible to definitely fix the line of the McGregor Western through O'Brien county, and that the line adopted prior to that time was necessarily provisional in its nature.

2. That a recognition by both governments of that part of the line east of Clay county was not at all inconsistent with the change of the line in Clay and O'Brien counties to conform to the granting act.

3. That the officers of the government, to whom was confided the administration of the grant, never accepted the first location as a definite one, and the change made by the maps filed in 1869 was authorized, if not required, by the department.

4. That, under the law, this action of the department and of the grantees was justified by the facts of the case.

5. That, while the action of the department in certifying and conveying lands was conclusive as to the legal title, it was not so in respect to the parties entitled to the beneficial interest, and that, notwithstanding the designation of the Sioux City and St. Paul Railroad Company as beneficiary, the title to the lands in controversy was held by the state, in trust for grantors of defendant in error.

6. That all of the overlapping lands belonged to the two companies as tenants in common, each being entitled to an undivided half.

See 10 Fed. Rep., 435 to 450.

On appeal to this court the decree entered in pursuance of this opinion was affirmed except as to the lands with ten miles of each road, and outside the ten mile limit of the other. As to such lands, it was held that the entire title went to the company within whose ten mile limits they were located.

*R. R. Co.* v. *R. R. Co.*, 117 U. S., 406.

See also decree entered in Circuit court in pursuance of mandate from this court. (Rec., 29 to 34.)

## Issuance of Patents from the State of Iowa to the Chicago and Milwaukee Company.

Pending the controversy between the companies, the patents were withheld to await the determination by the courts as to which company was entitled to receive them. After entry of the decree in the Circuit court, in conformity to a mandate from this court, a patent was issued to the Chicago and Milwaukee Company, grantor of defendant in error, for the lands within the ten mile limits of its own line of road, and outside the ten mile limits of the other road. The *tract in dispute* was included in this patent.. (Exhibit M, Rec., 37 to 39.)

**Conveyance from Chicago and Milwaukee Railroad Company to Defendant in Error.**

See Exhibit N, Rec., 40; also pages 100 and 101.

*Nature of the claim of plaintiff in error.* Plaintiff in error relies upon rejected applications made at the local office in February, 1884, to enter the land under the homestead law. His first application was filed eleven years after the issuance of the patent from the government to the state for the benefit of the railway company. His settlement upon the land commenced the same year as that in which he made this first attempt to enter it at the land office.

The contents of his applications are not disclosed. All that appears in the testimony in reference to them is his statement as a witness that he filed them. The rejection of both of them appears only by inference from his statement that at the time he made the second one he took his appeal, and there is no evidence as to how the appeal was disposed of.

The only other evidence in the record as to his alleged claim consists in his statement as a witness, that he took possession of the land by the consent and authority of the secretary of the interior and of the commissioner of the general land office, and of a Mr. Struble, then a member of Congress.

It is not shown how the consent was manifested or the authority conferred. He says he had a conversation with the commissioner, and a letter from the secretary of the interior, but he fails to mention what was said by the commissioner or to produce or give the contents of the letter from the secretary,

## Errors Assigned in State Supreme Court.

1st. In receiving in evidence acts of the legislature of Iowa, for that said acts changed the terms of the grant to the state by act of Congress, approved May 12, 1864, said acts being in conflict with the act of Congress making the grant, and therefore void.

2d. In receiving in evidence Exhibits A, B, C and E [maps attached to record]; for that said exhibits tend to show a relocation of the line of railroad and acquiescence therein by the land department, without authority from Congress so to do.

3d. In receiving in evidence the patent for said land to the State of Iowa from the general government, and patent from the state to plaintiff's grantor; for that said land did not pass under the grant to the state.

4th. In holding the plaintiff entitled to the land in suit, situated west of the point to which the railroad was constructed upon the line of definite location, filed in the general land office August 30, 1864, as shown by Exhibit A of plaintiff's testimony.

5th. In holding that the changes of the constructed line from the line of definite location, to which the grant enured, did not defeat the railroad company's right to the land in suit.

6th. In holding the land in suit enured to plaintiff's grantor under said grant to the state, and the state legislation in referr ence thereto.

7th. In holding the defendant's right to the land in suit, under his settlement and application to enter the same under the Homestead act, inferior to plaintiff's claim thereto.

8th. In holding, defendant had no equities in the land in suit and dismissing his claim thereto.

The claim urged upon the Supreme court by plaintiff in error was that the land did not pass under the grant, and was, at the date of his application, subject to homestead entry, notwithstanding the fact that long prior thereto it had been *patented* to the state under the railroad grant. Other objections to the title of defendant in error were embraced in the assignment of errors, but all save this one were abandoned on the argument, as will appear by reference to the opinion of the court. (Rec., 106.)

The only objection to the recovery by the defendant in

error there urged or considered was that the land did not fall within the limits of the grant. It was not, and could not be denied that the tract in question is within ten miles of the amended line of the road, but plaintiff in error contended that there was no authority for making the change, and that the amended route does not constitute the true line of definite location.

## What The Iowa Supreme Court Decided.

The only reference to the alleged claim made by plaintiff in error for himself is embraced in the following extract from the opinion:

"Appellant took possession of the land in February, 1884, and during that month he made application to enter it under the homestead laws of the United States. He built a house upon the land, made other improvements, and has resided thereon since March, 1884. His first application to enter it seems to have been rejected or withdrawn, as he made a second one in September, 1885. The evidence as to that is meagre, but, since he took an appeal, from something not stated we infer that it was rejected. Defendant claims some right to enter the land by virtue of a letter from the commissioner of the general land office written in 1884, and a conversation had with him in 1885, but the record does not disclose what was contained in the former, or said in the latter." (See opinion, page 106, Record.)

The contention of counsel for appellant, now plaintiff in error, is thus stated in the opinion:

"The questions raised by the pleadings are numerous, but most of those raised by the answer have been waived in this court. The matter now in controversy is stated by counsel for appellant as follows: 'The vital question is, having located the line of road in August, 1864, and filed the map of definite location in the office of the Secretary of the Interior, and had the lands inuring to the grant withdrawn, based upon such location, can the line of definite location be changed by the company without the consent of Congress, and if changed, does the change extend or change the land grant as fixed by the definite location of the line of road in 1864?'"

That the line of location of a land grant road, becomes definitely fixed when the map of location is filed and accepted by the land department, was conceded to be well established as a general rule, but the court, following *R. R. Co.* v. *R. R. Co.*, 10 Fed. Rep., 435–450, S. C., 117, U. S., 406, were of opinion that this rule could have no application to a case like the present, in which the attempted location did not conform to the requirements of the granting act. The filing and acceptance of the map of such attempted location, could not dispense with performance of these requirements. The new line, therefore, was not a relocation, but an original location within the meaning of the granting act, and the land in dispute passed under the grant. (See opinion, Rec., 106 and 107.)

Having reached this conclusion, it was unnecesary to decide whether any claim to the land was presented by plaintiff in error, in such form as to enable the court to adjudicate upon its validity, if the title of defendant were out of the way. Or whether, if such claim had been presented in proper form, the defendant below, by an attempted entry at the land office, years after the land had been patented to the state, and all control and jurisdiction over it had passed from the land department, could acquire any such interest as would entitle him to contest the title of the plaintiff below.

If either of these propositions involve a federal question within the meaning of the Judiciary Act, or can be said to present a question of any kind, no such question arose in or was decided by the state Supreme court.

## Errors assigned in this court.

1. In so constructing the Congressional land grant as to hold plaintiff entitled to the land in suit, situated west of point to which railroad was constructed upon line of definie locatiotn, filed in the general land office, August 30, 1864.

2. In holding that the railroad company acquired any additional rights in the land granted by reason of the change made September 9, 1869, in the definitely located line without authority of Congaess for making said change.

3. In holding that the changes in the constructed line from the line of definite location, did not defeat the railroad company's right to the land in suit.

4. In holding the land in suit enured to plaintiff's grantors under the grant to the state by the act of Congress, approved May 12, 1864, and the stale legislation in reference thereto.

5 and 6. In so construing the homestead act of the United States, under which plaintiff in error sought to enter land in suit, as to hold his rights thereunder inferior to the rights of defendant in error, under the Congressional land grant of May 12, 1864.

## BRIEF OF ARGUMENT

### I.

**To confer jurisdiction upon this court to review the decision of a state court, it must appear that such decision was against the right or title claimed under federal law or authority.**

A decision in *favor* of such right or title is not open to review here. (See Argument, *post*, 27.)

Authorities cited:

*Gordon* v. *Caldleugh*, 3 Cranch, 268.
*Scott* v. *Jones*, 5 How., 375.
*Strader* v. *Baldwin*, 9 How., 261.
*Linton* v. *Stanton*, 12 How., 423.
*Calcote* v. *Stanton*, 18 How., 243.
*Ryan* v. *Thomas*, 4 Wall., 603.
*Missouri* v. *Adriano*, 138 U. S., 497.

### II.

**It is also essential that such right or title be claimed by plaintiff in error for himself and not for another.**

The rejection by the state court of the defense of an outstanding title in the United States would not bring the case within the jurisdiction of this court. Nor would the allowance of a recovery in the state court by the plaintiff below, without title, be sufficient for that purpose. (See Argument, *post*, 28.)

Authorities cited:

*Owings* v. *Norwood*, 5 Cranch, 344.
*Henderson* v. *Tennessee*, 10 How., 323.

*Burke* v. *Gaines*, 19 How., 388.
*Verden* v. *Coleman*, 1 Black., 474.
*Long* v. *Converse*, 91 U. S., 113.
*Miller* v. *Bank*, 106 U. S., 544.
*McNulty* v. *Lochridge*, 141 U. S., 327.

## III.

### A Mere Pretence of Such a Claim insufficient.

It is not enough for a party to come into court and say: "I claim under the United States." There must be at least color of ground for such claim. (See Argument, *post*, 30.)

Authorites cited:

*Wynn* v. *Morris*, 20 How., 3.
*Millingar* v. *Hartupee*, 6 Wall., 258.
*City of New Orleans* v. *Water-works Co.*, 142 U. S., 79.

Even where there is technical jurisdiction, if the question on which jurisdiction depends is clearly frivolous, a motion to affirm, when united to a motion to dismiss for want of jurisdiction, will be granted, especially when the decision of the state court was in accordance with previous decisions of this court in similar cases. (See Argument, *post*, 32.)

Authorities cited:

*Arrowsmith* v. *Harmoning*, 118 U. S., 194.
*Church* v. *Kelsey*, 121 U. S., 282.
*Railway Co.* v. *Fraser*, 139 U. S., 288.
*Chanute* v. *Trader*, 132 U. S., 210.

## IV.

**To present a Federal Question for Decision in this Court, the Facts out of which it arises must be either Admitted or Proved.**

(See argument, *post*, 33.)

Authorities cited:

*Merced Mining Co.* v. *Boggs*, 3 Wall., 304.
*Caperton* v. *Bullard*, 14 Wall., 238.
*Washing & Water Co.* v. *Kayes*, 96 U. S., 199.
*Railroad Co.* v. *Ferry Co.*, 119 U. S., 615.
*DeSaussure* v. *Galliard*, 127 U. S., 216.
*Clark* v. *Commonwealth*, 128 U. S., 395.
*Blount* v. *Walker*, 134 U. S., 607.
*Cook County* v. *Calumet & C. Canal & D. Co.*, 138 U. S., 635.
*City of New Orleans* v. *Water-Works Co.*, 142 U. S., 79.

## V.

**Decision of State Court in favor of, not against only Right ~~of~~ or Title claimed under Federal Law ~~of~~ or Authority.**

The plaintiff in error was a naked trespasser, without right or color of right, whose real defense was an alleged outstanding title in the United States, in which he has no interest. The pretense of claim set up for himself, being wholly unsupported by proof of the facts upon which its validity depends, presents no question for review in this court. (See Argument, *post*, 35.)

## VI.

### If Technical Jurisdiction Exists, the Motion to Affirm Should be Sustained.

This relief is asked upon two grounds:

1. Repeated adjudications of this court are adverse to the alleged claim of plaintiff in error, upon which the jurisdiction, if any, depends.

2. In sustaining the title of defendant in error, the state tribunals proceeded in accordance with prior decisions of this court, the correctness of which admits of no doubt.

### 1.

### Repeated Adjudications of This Court are Adverse to the Alleged Claim of Plaintiff in Error, upon which the Jurisdiction, if any, Depends.

Without regard to whether the land fell within the grant to the grantors of defendant in error, it was not open to settlement or entry at the date of Hamblin's attempted settlement or entry.

This proposition resolves itself into these three, each of which is sustained by a long line of decisions in this court:

(*a.*) It was *reserved* from sale or entry by previous orders of withdrawal issued by the department for the purpose of adjusting the grant. (See Argument, *post*, 41.)

Authorities cited:

U. S. Rev. St., Sec. 2257.
*Woolsey* v. *Chapman*, 101 U. S., 755.
*Bullard* v. *Railroad Co.*, 122 U. S., 167.
*U. S.* v. *R. R. Co.*, 142 U. S., 510.

(*b.*) All *jurisdiction* of the *department* over the land *ceased* with the issuance of the *patent* to the *state*, long *prior* to the attempted entry or settlement, and hence no right could be acquired thereby. (See Argument, *post*, 46.)

Authorities cited:

*St. Louis Smelting Co.*, v. *Kemp*, 104 U. S., 638.
*Moore* v. *Robbins*, 96 U. S., 530.
*U. S.* v. *Minor*, 114 U. S., 233.
*Lee* v. *Johnson*, 116 U. S., 48.
*Bohall* v. *Dilla*, 114 U. S., 47.
*Sparks* v. *Pearse*, 115 U. S., 408.

(*c.*) If on the other hand, the land did fall within said *grant*, it *attached* to the land as a *present grant* upon the filing of the map of the amended route in 1869, since which time no rights could be acquired by settlement upon, or attempted entry of them. (See Argument, *post*, 51.)

Authorities cited:

*R. R. Co.* v. *Dunnemeyer*, 113 U. S., 629.
*Walden* v. *Knevals*, 114 U. S., 373.
*Grinnell* v. *C. I. & P. R. R. Co.*, 103 U. S., 739.
*Van Wyck* v. *Knevals*, 106 U. S., 360.

## 2.

**In Sustaining Title of Defendant in Error state Tribunals proceeded in Accordance with Prior Decisions of this Court.**

### A.

*New line established through Clay and O'Brien counties the true line of definite location, and hence land falls within the grant.*

The attempted location of 1864, failing to comply with the requirements of the granting act, could not dispense with the performance of such requirements. The new location through those counties was therefore not a relocation but an original location within the meaning of the granting act. (See Argument, *post*, 52–62.)

Authorities cited:

*R. R. Co.* v. *R. R. Co.*, 117 U. S. 406, affirming S. C., 10 Fed. Rep., 435 to 530.

### B.

*Deflections of line of road constructed from that of definite location not such as to destroy identity of road built with that of definite location, or to affect title of company.*

1. *The acceptance of the road, as constructed, by the interior department is conclusive upon this point.* The secretary of the interior is the officer upon whom the act devolved the duty of executing the grant. Before issuing the patents he must determine that the road was constructed in conformity to the act. This involved the exercise of judicial functions, and the rule applies, that where a special tribunal is authorized to determine as to

matters arising in the course of its duties, its decision, within the scope of its authority, is not subject to revision in any other tribunal. Not further argued.

Authorities cited:

*Martin* v. *Mott*, 12 Wheaton, 31.
*R. R. Co.* v. *Stimpson*, 14 Peters, 448.
*Johnson* v. *Towsley*, 13 Wall., 72.
*Moore* v. *Robbins*, 96 U. S., 530.
*St Louis Smelting & Refining Co.* v. *Kemp*, 104 U. S., 636.
*Lee* v. *Johnson*, 116 U. S., 48.
*R. R. Co.* v. *Attorney General*, 118 U. S., 682.

2. *If subject to review here, the correctness of the decision of the honorable secretary is not open to doubt.* See opinion of Secretary Schurz, set out in the record, at pages 20 to 22, in which he states at length the reasons for his accepting the road; also opinion of Secretary Lamar, set out on pages 101 and 103 of record, denying application of settlers in O'Brien county, asking that suit be commenced in name of United States to assert title to lands in question for their benefit, and in which the honorable secretary holds that the grant was in all respects complied with by the company. Not further argued.

## C.

***If conditions of grant had not been complied with in this or any other respect, title would still remain unimpaired in grantee until forfeiture is asserted by the government.***

The grant being *in præsenti*, the conditions annexed are conditions subsequent, a breach of which can be taken advantage of only by the government. And if it does

not see fit to enforce a forfeiture, the title does not revert upon condition broken. Not further argued.

Authorities cited:

*Schulenberg* v. *Harriman*, 21 Wall., 44.
*Grinnell* v. *R. R. Co.*, 103 U. S., 739.
*Van Wyck* v. *Knevals*, 106 U. S., 360.
*R. R. Co.* v. *McGee*, 115 U. S., 469.

D.

*Grantor of defendant in error obtained a good title by its decree against Sioux City Company and patent from the State, if not by the grant.*

The equity of the Sioux City company was complete against every one except the grantor of defendant in error, to whom it was transferred by the decree. With this equity the legal title was united by the patent from the state. The correct view, however, is that the equitable ownership vested in the grantor of defendant in error by the grant made by the act of Congress. (See Argument, *post*, 62–66.)

Authorities cited:

*R. R. Co.* v. *R. R. Co.*, 117 U. S., 406, affirming, S. C., 10 Fed. Rep., 435–450.

E.

*Plaintiff in error in no position to question Title of Company.*

The validity of the patent to the state can be questioned only by the government or by some one having an equitable interest in the land prior to its issuance. Defendant had no interest prior to the date of that instrument, and could acquire none by his attempted entry and settlement

thereafter, since by the patent, if not before, the lands passed beyond the jurisdiction of the department. (See Argument, *post*, 66–69.)

Authorities cited:

*Moore* v. *Robbins*, 96 U. S., 530.
*Lee* v. *Johnson*, 115 U. S., 48.
*Bohall* v. *Dilla*, 114 U. S., 47.
*Sparks* v. *Pearce*, 115 U. S., 408.

## ARGUMENT.

### I.

**To confer jurisdiction upon this court to review the decision of a state court, it must appear that such decisson was against the right or title claimed under federal law or authority.**

The object of the present judiciary act is not to give a right of review wherever the validity of an act of Congress was drawn in question, but to prevent the state courts from impairing the authority of the federal government by giving a construction to its statutes adverse to such authority. If the construction given by the state court to the act under which the right is claimed, be favorable to such right, no such reason exists for review by this court.

The decision of a state Supreme court sustaining the validity of a discharge in bankruptcy, contested on the ground of fraud or that the debt was incurred by defendant while acting in a fiduciary capacity, presents no question of which this court can take jurisdiction.

*Strader* v. *Baldwin*, 9 How., 261.

*Linton* v. *Stanton*, 12 How., 423.
*Calcote* v. *Stanton*, 18 How., 243.

Neither does such a decision sustaining the validity of a patent for land, contested on the ground that the patentee was a fictitious person.

*Ryan* v. *Thomas*, 4 Wall., 603.

Nor does a decision sustaining the validity of a deed executed by commissioners or trustees with power to convey the title of the United States to the property in question, contested on the ground that the defendants in error did not come within the description of persons to whom the trustees were authorized to convey.

*Scott* v. *Jones*, 5 How., 375.

Nor a decision in a proceeding to test the title to an office, that the respondent was a citizen of the United States, the relator claiming no right or title respecting his own status as a citizen.

*Missouri* v. *Adriano*, 138 U. S., 497.

Nor one granting a petition for the removal of the cause to the Federal circuit court.

*Gordon* v. *Caldcleugh*, 3 Cranch., 268.

II.

**It is also essential that such right or title be claimed by the party invoking the jurisdiction for himself, and not for another.**

It was open to the defendant below to show an outstanding title in the United States. That, if true, would certainly be a complete defense to the action; but the right to make

such a defense was one given, not by any law of the United States, but by the common law, and if it was erroneously rejected by the state court, this court has no power to correct the error.

The precise point was determined for the first time in *Owings* v. *Norwood*, 5 Cranch, 344. The action there was ejectment. Norwood claimed under a patent from the state founded upon proceedings in escheat. To defeat a recovery, Owings endeavored to show an outstanding title in British subjects protected from confiscation by the British treaty. The Maryland Court of Appeals decided that the title was not protected by the treaty or the plaintiff's right of recovery affected by it.

As the right of the plaintiff in error did not grow out of the treaty, the question whether the treaty was an obstacle to the plaintiff's recovery this court regarded as one exclusively for the courts of Maryland, and the writ of error was accordingly dismissed.

In *Burke* v. *Gaines*, 19 How., 328, the defense was that the title had not passed out of the United States. Chief Justice TANEY, after stating the facts, said:

"It appears, therefore, that no right was claimed by the plaintiff in error under any Act of Congress or under any authority derived from the United States. He merely objected to the validity of the title claimed by the defendant in error. As the case appears upon the record, he was a mere trespasser holding possession in opposition to a title claimed under the United States. The decision of the state court in favor of the title thus claimed by the defendants in error can certainly give the plaintiff no right to bring this writ under the twenty-fifth section of the Act of 1789. He claimed no right under the United States, and consequently can have no foundation for his writ of error."

*Henderson* v. *Tennessee*, 10 How., 323, turned upon the validity of the title of Andrew Miller to the lands in question under treaties with the Cherokee nation, which was

set up by the plaintiffs in error, not to show a right in themselves, but that the lessor of the plaintiff had none, and had no right to enter upon them. This court refused to review the decision of the state court against the validity of that title. Plaintiffs in error, it was said, might have been mere trespassers, and still the defense would have been a good one if the outstanding title was superior to that of the plaintiff below. The right to make this defense, however, was not derived from the treaty, but from the laws of the state. The title set up was claimed under a treaty, but to give jurisdiction to this court the party must claim the right for himself and not for another. Numerous other cases are to the same effect.

*McNulty* v. *Lochridge*, 141 U. S., 327.
*Miller* v. *Bank*, 106 U. S., 544.
*Long* v. *Converse*, 91 U. S., 113.
*Verden* v. *Coleman*, 1 Black., 474.

## III.

### A mere pretense of a claim under the United States not sufficient to confer jurisdiction.

To authorize this court to examine the claim relied on to give jurisdiction, it need not, of course, be a valid one; but it should have some foundation in reason and in fact. It is difficult to perceive how a proposition can involve any question, state or federal, if it is so plain that sensible men could not differ in regard to it, or how any question can remain for the determination of this court upon a point that it has settled by repeated adjudications.

In *Millingar* v. *Hartopee*, 6 Wall., 258, Mr. Chief Justice CHASE said:

"Something more than a bare assertion of such an authority seems essential to the jurisdiction of this court. The authority intended by the act is one having a real existence, derived from competent governmental power. If a different construction had been intended, Congress would doubtless have used fitting words. The act would have given jurisdiction in cases of decisions against claims of authority under the United States.

In respect to the question we are now considering, 'authority' stands upon the same footing with 'treaty' or 'statute.' If a right were claimed under a treaty or statute, and on looking into the record it should appear that no such treaty or statute existed or was in force, it would hardly be insisted that this court could review the decision of a state court that the right claimed did not exist."

*Wynn* v. *Morris*, 20 How., 2, was a writ of error to the Supreme court of Arkansas. Morris claimed under a pre-emption right acquired from Keziah Taylor, widow. Wynn claimed under an Act of Congress, not directly, but by assignment from the state, and the case turned, not on the effect of this contract with the state, but on the point as to whether the lands passed to the state under the grant by the Act of Congress. He sought a decree upon the ground that Morris procured the widow to enter the land for his benefit when she had no right of pre-emption because of the abandonment of her possession. Officers of the land department refused to investigate the fact of abandonment. To correct this alleged error the bill was filed. The state court refused the relief prayed, adjudged that Mrs. Taylor had obtained and conveyed title to the defendant, and decreed damages again st Wynn for detaining possession. The conclusions of the court are thus stated:

"If Wynn had no title, of course he could not claim under a law of the United States, and cannot come here under the 25th section of the Judiciary Act of 1789 merely to draw in question the decree which dismissed his bill.

To this effect are the case of *Owings* v. *Norwood's Lessee*, 5 Cranch, 344; *Henderson* v. *Tennessee*, 10 How., 311.

Wynn sets up a pretension of claim to the land in dispute through the State of Arkansas, which state was authorized to locate 500,000 acres of land by Acts of Congress passed in 1841 and 1842, and the complainant insists that he had made a contract with the state, through its locating agent, Charles E. Moore, who was acting under instructions from the governor of said state, to the effect that he, the complainant, should be allowed to purchase the land from the state at $2 per acre. But the state did not locate this quarter section, nor had it an interest in it at any time; so that the title was outstanding in the United States till Keziah Taylor made her entry."

It will be seen that Wynn's title, such as he had, was claimed under the United States. That he succeeded to the rights of the state was not disputed, and the question was whether any rights in the land had been conferred on the state by the United States. The refusal of the court to take jurisdiction rests not upon the ground that Wynn did not claim under the United States, but that the claim itself was so devoid of merit that it did not present any question, state or federal.

"The bare averment of a federal question is not in all cases sufficient; it must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a federal question might be set up in almost any case and the jurisdiction of this court invoked simply for the purpose of delay."

*City of New Orleans* v. *Water-works Co.*, 142 U. S., 179.

If the decision complained of was, so far as the question on which jurisdiction depends, so clearly right that the case ought not to be kept here for further argument, and especially if it was in accordance with the previous decisions of this court in similar cases, there is color for a motion to dismiss. And when, in such cases, a motion to affirm is united with the motion to dismiss for want of jurisdiction, the practice is to grant the motion to affirm. *Arrowsmith* v. *Harmoning*, 118 U. S., 194; *Church* v. *Kelsey*, 121 U. S., 282; *Railway Co.* v. *Fraser*, 139 U. S., 288; *Chanute* v. *Trader*, 132 U. S., 210.

## IV.

**To raise a federal question, the facts on which the validity of the alleged claim depends must be either proved or admitted.**

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Effect can be given to a law or an authority exercised under it, only when the facts exist to which it can apply. It is not enough for the party asking this court to adjudicate upon and enforce a right alleged to have been denied him by the state court, to say that he claims under a statute of or an authority exercised under the United States. He must present the facts relied on to establish his claim, so as to enable the court to see whether it necessarily depends upon a federal law or authority. If he relies upon a federal statute, the facts which call it into operation must be alleged and proved. The averment that it is in operation, will not suffice, for that is the precise question the court is called upon to determine.

*Washing & Water Co.* v. *Keyes*, 99 U. S. 199.

It must appear on the face of the record that the facts as they were actually presented for adjudication made it necessary for the state court to consider the constitution or a law or treaty of the United States.

*Railroad Co.* v. *Ferry Co.*, 119 U. S., 614.

To enable this court to determine that the decision of the state court was against the right set up or claimed, the facts upon which the alleged right depends must be established and the evidence by which they were proved, preserved in the record.

*Clark* v. *Commonwealth*, 128 U. S., 395.

The question whether the same effect has been given to a judicial state record in another state as it has in its own, cannot arise unless the record is authenticated as required by the act of Congress.

*Caperton* v. *Bullard*, 14 Wall., 258.

Before this court can be asked to determine whether a statute has impaired the obligation of a contract it must appear that there was a *legal contract* subject to impairment, and some ground to believe that it has been impaired.

*City of New Orleans* v. *Water Works Co.*, 142 U. S., 79.

The decision of the state court denying, not the *validity*, but the *existence* of an authority exercised under the United States, is not open to review here.

*Merced Mining Co.* v. *Boggs*, 3 Wall., 304.

Where, as in this case, there was no express adjudication by the state court upon the federal right alleged to have been denied, it must appear, in order to give this court jurisdiction, that the judgment as rendered could not have been given without deciding upon it.

*Cook County* v. *Calumet & C. Canal & D. Co.*, 138 U. S., 635.

*Blount* v. *Walker*, 134 U. S., 607.

*De Saussure* v. *Galliard*, 127 U. S., 216.

In the absence of any and all evidence of the facts necessary to bring the case within the operation of a federal statute or treaty, or to show the exercise of an authority under the United States purporting to confer a right upon the plaintiff in error, this condition, it is submitted, cannot be fulfilled. So far as the question of

jurisdiction is concerned, what difference can there be between a case in which the jurisdictional facts are denied by the state court and one in which the record contains no evidence of such facts?

## V.

### The decision of the state court was in favor of, not against, the only right or title claimed under federal law or authority.

The title of defendant in error was so claimed and was sustained by the state court. Whether in so deciding error was committed it is not for this court to inquire, unless some right claimed by plaintiff in error under the United States was thereby defeated.

The right of Hamblin to insist that the plaintiff below must recover, if at all, upon the strength of its own title and not upon the weakness of the title of its adversary was not a right derived from any statute of, or authority exercised under the United States. It was a mere common law right, the protection and enforcement of which was confided wholly to the state tribunals, and if they erred in rejecting it this court is powerless to correct the error. The same is true of the defense of an outstanding title in the United States, if any existed.

What other right, title or claim was denied to Hamblin by the state court? Omitting *objections*, which were interposed by plaintiff to each question, and exceptions taken to the rulings permitting the witness to answer, the following contains all that is material of the testimony relating to the alleged application to enter the land under the homestead law, as well as the alleged permission by the officers of the department to go into possession of it.

"Q. You may state whether you have made any application to enter the land upon which you are residing?

A. I have.

Q. About when did you make that application for your number?

A. The application was made in September, 1885; I think the second application; I made one application before that; the second application, at which time I took my appeal, was made in September, 1885.

Q. Was that a homestead or a timber lien?

A. It was a homestead application. I took my first application February, 1884.

Q. What was the nature of that application?

A. A homestead.

Q. By what authority did you enter upon the land in question in this case?

A. By authority of the Secretary of the Interior, of the Land Commissioner, and Mr. Struble.

Q. Of the United States?

A. Yes, sir.

The COURT: What was that last?

Q. By the authority of the Secretary of the Interior, the Land Commissioner, and Mr. Struble.

Q. Of the United States?

A. Mr. Struble of Iowa; yes, the Land Commissioner of the United States.

Q. The Commissioner of the General Land Office of the United States, do you refer to?

A. Yes, sir.

Q. And the Secretary of the Interior of the United States?

A. Yes, sir.

Q. You may state whether or not you entered with the consent of the Secretary of the Interior and the Commissioner of the General Land Office of the United States?

A. I so understood it; yes." (See Rec., 71 and 72.)

To constitute a claim arising under a law of, or an authority exercised by or on behalf of the United States, it is surely not enough for a party to assert that he makes such claim. The facts constituting the claim must appear in the evidence so as to enable the court to say whether or not its validity depends upon such law or authority. If a statute is relied on, facts which bring the case within

it must be shown. If the claim is based upon the exercise of an authority, facts showing the exercise of such authority must appear before any question concerning its validity or effect can arise.

Under the homestead law every person possessing the qualifications therein prescribed is authorized to enter a quarter section, or less quantity, of public land, upon making affidavit before the local officers of his qualifications, and that such application is made for his exclusive use and benefit, and for the purpose of actual settlement and cultivation, and not directly or indirectly for the use or benefit of any other person. There is not a scintilla of evidence of a compliance with this provision. Nor are any facts testified to which present the question as to whether or not there was such compliance.

There was, it is true, some proof on the trial of some of the facts essential to give Hamblin the status of a homesteader if the land were subject to entry. But that is not the point. The point is that there is nothing in the record to show that these facts or any of them were made to appear in the proper manner, or in any manner for that matter, to the local officers.

From Hamblin's statement that he took an appeal at the time of filing his second application, the inference is that both of his applications were *rejected* by the local officers. But the form and contents of the applications not being disclosed, how is this court enabled to judge of their sufficiency? No authority was exercised under the United States purporting to confer any rights upon him. Nor do any facts appear in evidence from which it can be determined whether or not the local officers did right in rejecting his claim. In this state of the case, what question can arise concerning the validity or construction of

any law of the United States? What is there to call the jurisdiction of the court into exercise?

Another thing. Assuming the applications to have been in due form, it appears from undisputed evidence that they were both made long after the department ceased to have any jurisdiction or authority over the land in controversy. This first application was filed eleven years subsequent to the issuance of the patent to the state under the grant. Can such a bald pretense as that present a federal question within the meaning of the judiciary act? Can it be said to present any question, state or federal? Is it really questionable whether the title of the government passed by the patent, if not before? Or whether, after the title passed, any power of disposal over the land remained in the department?

Any one can file an application at the local office. It can be done just as easily a hundred years from now as it was eleven years after the issuance of the patent. If that is all that is necessary to raise a federal question, no trespasser upon any part of what was once our vast public domain, need ever be at a loss for a pretense upon which to invoke the jurisdiction of this court. The validity of any and every patent for land, issued since the foundation of the government, is liable, for all time to come, to be brought here for adjudication. If it is once understood that a case can be thus easily hung up here indefinitely, the business of the court will doubtless be rapidly increased, and the law's delay unduly prolonged to the vexation and disappointment of litigants who have real grievances to be remedied.

The only other right asserted is derived from an alleged permission of some secretary of the interior to go into possession. But what proof is there that such per-

mission was in fact given? The mere statement of the witness that he went upon the land by authority of that officer. He refers to a letter which was not produced, or its contents disclosed, and to a conversation of which he does not pretend to repeat a single word, either in substance or effect.

This, it is submitted, is no proof of the exercise of an authority purporting to confer any rights upon him. It is for the court to say what constitutes the exercise of such an authority or the granting of the permission claimed; and in order to enable the court to determine that question, the facts relied on must be proved. The general statement of the witness that an authority was exercised does not afford such proof, nor does it present any material fact which raises the question as to the validity of an authority so exercised. It is the mere inference or conclusion of the witness from a state of facts which he does not see fit to disclose.

It may well be doubted whether any permission by the secretary of the interior given otherwise than in the usual way, upon application duly made at the local office, would be of any avail even if the land were within the jurisdiction of the department. It is not the province of the heads of the land department to deal with the public lands as a private owner would deal with his own property, but to supervise the actions of the local officers in the allowance or rejection of entries. The validity of an irregular, unofficial arrangement such as is indicated would be more than doubtful.

But before any question can arise as to the validity of an authority exercised, its existence must be established. This, in the present case, was not done, nor even attempted. There is, therefore, " nothing for this court to

"act upon." If the court should take jurisdiction, and were satisfied that the plaintiff below had no title, and the state court therefore erred in sustaining a recovery that would be no ground for reversal. To warrant a reversal, it must further appear that a federal right, presented in such form that this court can adjudicate upon and enforce it, was denied him by the state court. The right to occupy the land in question as a trespasser, until some claimant showing a better title appears to contest it with him, is not of this class, and, under the evidence that was the only right to which, in any event, Hamblin could lay claim.

The alleged claim, under the Homestead Law, was evidently a mere pretext, or some evidence would have been offered in its support. The real defense relied upon was the alleged invalidity of the title of plaintiff in error, and that, it has been seen, presents no question of which this court can take jurisdiction, for want of which the writ should be dismissed.

## VI.

## If technical jurisdiction exists, the motion to affirm should be sustained.

Upon this branch of the case it is submitted:

1. Repeated adjudications of this court are adverse to the alleged claim of plaintiff in error, upon which the jurisdiction, if any, depends.

2. In sustaining the title of defendant in error the state tribunals proceeded in accordance with a prior decision of this court.

These propositions will be discussed in the order named.

## I.

**Repeated adjudications of this court are adverse to the alleged claim of plaintiff in error upon which the jurisdiction, if any, depends.**

It must be conceded that this court would have no power to revise the decision of a state court merely to correct an alleged error in allowing the plaintiff to recover without title, if such was the effect of its decision. If jurisdiction exists it is only for the purpose of adjudicating upon and enforcing some right of plaintiff in error to the land in question arising under a law or an authority exercised under the United States.

The contention of appellant (now plaintiff in error) is thus stated by the state Supreme court:

"The matter in controversy is stated by counsel for appellant as follows: 'The vital question is, having located the line of road in August, 1864, and filed the map of definite location in the office of the secretary of the interior, and had the lands inuring to the grant withdrawn, based upon such location, can the line of definite location be changed by the company without the consent of Congress, and, if changed, does the change extend or change the land grant as fixed by the definite location of the line of road in 1864?'

"The land in question was not within the limits of the grant, as indicated by the map of 1864, but is within the limits as shown by the maps of 1869, being less than ten miles therefrom, and is within eight miles of the road as finally constructed.

"It is contended by appellant that all the requirement of the law in regard to the definite location of the road were fully complied with in 1864, and that the location then made was final, in the absence of consent by Congress to a change; and that, as such consent was not given, the relocation of the road did not have the effect of extending the grant to land not included by the first location." (See Rec., 106.)

Let it be conceded for the sake of the argument, that counsel is correct in his contention. Does it follow that the

land in question remained subject to disposal under the general law? In the case supposed, could any interest have been acquired by plaintiff in error if his application had been allowed by the local officers? Clearly not.

Without regard to which line is to govern in fixing the limits of the grant to the Chicago company, the tract in question was not open to sale or entry at the date of Hamblin's settlement or application to enter, or at any time for at least eleven years prior thereto. This is so for three good and sufficient reasons:

*a.* It was *reserved* from sale or entry by the action of the department in 1869 and 1870.

*b.* All power of disposal or control of the department over it ceased with the issuance of the *patent to the state* in 1873 for the benefit of the Sioux City company, whose title was perfect against every one except the Chicago company.

*c.* If, on the other hand, the land is within the granted limits of the latter company, it was *reserved* by the act of Congress from sale or disposal from and after the filing of the map of the amended route in 1869.

Each of these propositions is sustained by a long line of decisions in this court.

### *A.*

### *Action of the Department in Reserving the Land From Sale or Entry.*

It has been shown (see page 9 of this brief) that subsequent to the filing of the maps of the amended route, the orders of withdrawal were modified by the department so as to include the lands in question. By letters of February 4, 1869, March 15, 1870, and May 11, 1870,

from the commissioner of the general land office to the register and receiver, enclosing diagrams showing the amended lines through Clay and O'Brien counties, also the ten and twenty mile limits defined by said amended line, the local officers were directed to withhold from sale or disposal all odd numbered sections within the place and indemnity limits indicated on said diagram, including the tract in question. This withdrawal was equivalent to the proclamation of the president, and, of itself, operated as a reservation of the land from sale or entry, and would have prevented Hamblin from acquiring any interest even if his application had been allowed, whether the land passed under the grant or not.

U. S. Rev. St., sec. 2,257.
*Wolsey* v. *Chapman*, 101 U. S., 755.
*Bullard* v. *R. R. Co.* 122 U. S., 167.
*U. S.* v. *R. R. Co.*, 142 U. S., 510.

These cases involved the title to lands along the Des Moines River. By act of August 8, 1846, Congress granted to the Territory of Iowa, for the purpose of aiding the improvement of the Des Moines River from its mouth to the Raccoon Fork in said territory, one equal moiety in alternate sections, the public lands in a strip five miles in width on east side of said river, within said territory.

A dispute arose as to whether the grant, like the improvement of the river, was limited to that portion of the river below the Raccoon Fork, or whether it extended the entire length of the river within the state. One of the secretaries of the interior, holding to the latter view, certified to the state a part of the lands above the Raccoon Fork. The lands in controversy in some of the

cases cited, however, were not among those so certified, but were among the odd sections lying north of those so certified, and within five miles of the Des Moines river.

In 1860, this court, in *R. R. Co.* v. *Litchfield*, 23 How., 66, decided that the grant did not extend above the Raccoon Fork. On March 2, 1861, Congress, by joint resolution, released to the State of Iowa, all lands so improperly certified and, by Act of July 12, 1862, the grant of 1846 was extended so as to include all the alternate odd sections within five miles of the river between the Raccoon Fork and the northern boundary of the state.

It appeared, however, that on April 6, 1850, Secretary Ewing, while he was of opinion that the grant did not extend above the Raccoon Fork, issued an order withholding all the lands then in controversy, from market until the close of the then session of Congress, in order to give the state the opportunity of petitioning for an extension of the grant of Congress. Subsequent orders of the department continued this reservation in force until the grant by the act of July 12, 1862.

The title of appellant was based upon pre-emption settlements made while these orders of withdrawal were in force, but before the action of Congress was had by which the United States was divested of its title.

This withdrawal was held to nullify settlements for the purpose of pre-emption during the reservation, notwithstanding it was afterwards found that the land so reserved did not pass under the grant, to protect which the order was issued, and the act making the grant did not contemplate such withdrawal. The grant by the act of July 12, 1862, was recognized as an original grant, as much so as if the act of 1846 had never been passed. The

orders of withdrawal vested no title in the state. They merely exempted the land from disposal under the general laws, and retained the ownership in the United States, free from adverse claims of third persons by pre-emption or otherwise, which could impair the subsequent gift of the land to the state.

The doctrine firmly established by these cases and many others that might be cited, is that land withdrawn, though erroneously, for the purpose of adjusting a congressional grant, are not subject to homestead or pre-emption entry, nor does even the decision of this court that they do not belong to the grant release them from the reservation. Some action of the department is necessary to restore them to market, and authorize the local officers to receive applications to enter them. It would be impossible to conduct the affairs of the land department upon any other principle. To permit rights or interests to be initiated in lands before claims which had previously attached are vacated or set aside would lead to chaos.

The application of the rule to this case can work no hardship or injustice to Hamblin. His position is very different from that of the settlers in the cases cited. Their claims being recognized by the local officers, there was nothing to put them on inquiry, and they made their settlements and improvements in good faith, and in entire ignorance of the order of withdrawal which reserved the lands there in controversy from market. Not so, however, with Hamblin. He was not misled by the action of the local officers. They denied his claim from the beginning, and there is no competent evidence in the record that it has at any time received recognition from any department of the government. He is a mere inter-

meddler, thrusting himself forward in a matter which does not concern him, and seeking to stir up a controversy where the parties in interest desire none.

In the absence of evidence that the tract in question was restored to market, the presumption is that the order of withdrawal remained in force until the time of Hamblin's application, if the land was not otherwise disposed of in the meantime, and that it was properly rejected by the local officers for that reason. Under the authorities cited, the allowance of his application would have conferred no rights upon him, and its rejection can place him in no better position.

*B.*

*The jurisdiction of the department over the land ceased with the issuance of the patent to the State in 1873, for the benefit of the Sioux City Company, whose title was perfect against every one except grantors of defendant in error.*

The tract in question, it will be remembered, is within what is known as the overlapping limits of the two roads aided by the grant by the act of May 12, 1864. If, as was held by the state Supreme court, the amended route of the Chicago company is the true line of definite location, the land fell within the limits of its grant and the title of defendant in error is unassailable. If that is not the true line of definite location, it would still be true that the title passed under the grant. The only difference would be that in the case last supposed it would go to the other company as a part of its indemnity lands.

It appears from undisputed testimony that on account of the prior location and construction of the last named line through the lands in controversy, the secretary of the

interior, by decision of February 11, 1873, sustained the claim of the Sioux City company to all of the overlapping lands, including the tract in controversy, and that all of such lands were accordingly patented to the state under date of June 17, 1873, and January 25, 1875, for the use and benefit of that company.

This, it has been seen, was eleven years before the rejection of Hamblin's pretended application to enter it under the homestead law. Upon what possible ground can it be pretended that the land remained subject to such attempted entry, or that any interest was acquired thereby? And, having no interest of his own in the matter, of what concern is it to him who gets the land?

The land either falls within the limits of the grant to the railroad company under which defendant in error claims, or it does not. If the negative hypothesis is true for the purpose of defeating the title under the grant, it is true for all purposes. Upon this assumption, what is there in the evidence to exempt the land from the operation of the indemnity grant to the other company? That it is within the indemnity limits of the road of that company, by which it was duly earned and was needed to fill its grant, for which purpose it had been duly selected and approved, are facts which appear from the recitals of the patent itself.

These recitals are at least *prima facie* evidence of their truth, and there is nothing in the record to contradict them. What more is needed to establish the validity of the patent or the title under it?

The land could remain subject to entry only upon the assumption that the patent was absolutely void. If, as plaintiff in error insists, the land is outside the limits of

the grant to the Chicago company, under whom defendant in error claims, what is there to indicate that it was even voidable? Every presumption, on the contrary, is in favor of its validity, and that with it passed from the government every vestige of right or title, legal or equitable, the legal title vesting in the state for the benefit of the Sioux City company.

It will be shown that the land did enure under the grant to the Chicago company, but, for all that, the patent was not void.

To render a patent void, it is not enough that the facts found by the officers of the department did not authorize its issuance, or that it was issued to the wrong person. It must appear that the department had no authority to patent the lands under any circumstances, or to any persons; in other words, that the lands were not subject to its jurisdiction. And this want of jurisdiction exists only where the lands have been previously disposed of or reserved from sale or for some other reason were not subject to the operation of the act the department was administering.

The leading case upon this subject is *St. Louis Smelting Co.* v. *Kemp*, 104 U. S., 638, in which the law is thus laid down by Mr. Justice FIELD.

"On the other hand a patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale or dedicated to special purposes, or had been previously conveyed to others. In establishing any of these particulars, the judgment of the department upon matters properly before it is not assailed, nor is the regularity of its proceedings called into question, but its authority to act at all denied, and shown never to have existed."

As further illustrating what is meant by saying that a patent is void, the court say:

"The general doctrine declared may be stated in a different form, thus: "A patent, in a court of law, is conclusive as to all matters properly determinable by the Land Department when its action is within the scope of its authority; that is, when it has jurisdiction under the law to convey the land. In that court the patent is unassailable for mere error of judgment. Indeed, the doctrine as to the regularity and validity of its acts, where it has jurisdiction, goes so far that if, in any circumstances under existing law, a patent would be held valid, it will be presumed that such circumstances existed."

Speaking of the conclusive effect of the patent as evidence of the facts upon which the authority to issue it depends, it is said:

"The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned and sealed, not merely operates to pass the title, but is in the natute of a final declaration by that branch of the government to which the disposal of the public lands under the law is intrusted that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law."

The grant to the state for the benefit of the two roads was by one and the same act of Congress, which conferred upon the secretary of the interior authority to issue patents to the state for the use of the company entitled. The land, therefore, was subject to the law the department was administering, and under its jurisdiction. It had authority to patent the land. If, as contended by plaintiff in error, the first location of the line of the Chicago company is to govern in fixing the limits of its grant, then the tract in question fell outside of that grant, and being within the indemnity limits of the grant to the other road, the patent was absolutely unassailable and vested a complete equity in the Sioux City company. If, on the other hand, the amended route of the Chicago line is the true line of definite location, the land belonged

to the Chicago company, under whom the defendant in error claims, and the action of the department in issuing the patent for the benefit of the Sioux City Company was erroneous, but not void.

The state took the legal title in either event. With the title passed away all authority and control of the land department over the title which it had conveyed. "It "would be as reasonable," say this court in *Moore* v. *Robbins*, 96 U. S., 530, "to hold that any private owner of "land, who had conveyed it to another, can, of his own "voliation, annul the instrument which he has made and "delivered" as that any officer of the government can rescind a patent or exercise any further authority over the land conveyed by it. Continuing, the court say:

"The functions of that department necessarily cease when the title has passed from the government. And the title does so pass in everywhere, under the decisions of the officers having authority in the matter, a conveyance, generally called a patent, has been signed by the president, and sealed and delivered to and accepted by the grantee. It is a matter of course that, after this is done, neither the secretary nor any other executive officer can entertain an appeal. He is absolutely without authority."

To the same effect are:

*Lee* v. *Johnson*, 115 U. S., 48.
*Bohall* v. *Dilla*, 114 U. S., 47.
*Sparks* v. *Pearse*, 115 U. S., 408.

These authorities, and many others that might be cited, are conclusive upon the point that the jurisdiction of the department over the land ceased with the issuance of the patent, and that no interest was or could be acquired by Hamblin's subsequent attempt to enter it at the local office. It is further manifest from the foregoing discussion, that, if as plaintiff in error contends, the new line established through Clay and O'Brien counties, in 1869, is not the true line of definite location of the Chicago com-

pany's road, every vestige of title or interest passed by the patent from the government to the state for the benefit of the Sioux City company as part of its indemnity lands, and that the title of that company was unquestioned.

C.

*If, on the other hand, such amended route is the true line of definite location, the land was reserved from sale or entry by the act of Congress, from and after the filing in the department, of the map of location of such amended route in 1869.*

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There is no legal proposition better established in this court, than that the grant being *in præsenti* attached to the land upon the filing of the map. It then acquired precision, and attached as a present grant to every odd section embraced within its limits. The lands were thereby severed from the public domain, and ceased to be subject to sale or other disposal of the government. Nor could any rights be acquired by subsequent settlement upon, or attempted entry of them.

The authorities upon this point are numerous and uniform.

*Railroad Company* v. *Dunnemeyer*, 113 U. S., 629.
*Walden* v. *Knevals*, 114 U. S., 373.
*Grinnell* v. *C. I. & P. R. R. Co.*, 103 U. S., 739.
*Van Wyck* v. *Knevals*, 106 U. S., 360.

## 2.

**In sustaining title of defendant in error, state tribunals proceeded in accordance with a prior decision of this court, the correctness of which admits of no doubt.**

*A.*

*Tract in question is within the ten-mile or granted limits of the road of grantor of defendant in error, as definitely located, and title thereto passed under the grant.*

That the quarter section in controversy is within the ten-mile limits of the amended line located by the McGregor Western, now the Chicago company, through Clay and O'Brien counties in 1869, cannot and will not be disputed. That it is beyond the terminus of the original location of 1864 is equally certain. If the latter is to govern, the tract in question falls outside the limits of the grant in aid of that line. If the former is to control, then the land falls within the ten-mile limits, and the title thereto passed under the grant to the grantor of defendant in error.

The ground upon which the state Supreme court based its decision, was that the attempted location of 1864, being illegal and unauthorized, was in effect no location; hence the establishment of the new line in 1869 was not a relocation, but an original and valid location, and the land in controversy being within the ten-mile limits of this new line, passed under the grant. In so deciding, it was but following the lead of this court.

*R. R. Co.* v. *R. R. Co.*, 117 U. S., 406, affirming, S. C., 10 Fed. Rep., 435 to 450.

The point, though not discussed in the opinion, was squarely presented by the record, and the court could not reach the conclusion announced without deciding it. The Sioux City and St. Paul Railroad Company, unlike appellant herein, *had* an interest in the controversy, which entitled it to dispute the validity of the relocation. Not only the particular lands which would fall within its grant, but the amount of lands it would receive, was directly affected by the decision of this question. If the location of 1864 was final and irrevocable, the Sioux City and St. Paul then acquired a vested right to other and different lands from those it would receive if the amended route was the one which should govern in adjusting the grant. That it did vigorously contest the right of the other company to relocate the western end of its line, appears from the following extract from its answer filed in the suit before mentioned:

"And these defendants allege that the location made in 1864, as aforesaid, was, and is, a compliance with the terms and conditions of the said act of Congress, and is a good and practicable route and location, free from engineering difficulties, and easy of construction, and was made and established by the McGregor Western Railway Company, and accepted and approved by the proper legal authorities of the United States, to a point in section 19, township 95, range 40 west, from which point to a point of intersection with the Sioux City and St. Paul railroad, was the only part of said line not definitely located and established.

"That from such point in said section 19 to such point of intersection is a *good*, *direct* and *practicable* route, free from engineering difficulties, and easy of construction."

In view of the exhaustive treatment it received in the opinion of Judge Love, in the Circuit court, 10 Fed. Rep., 435–450, the fact that further discussion of the question was deemed unnecessary by this court does not detract from the authority of its decision upon it. Nor is such

decision less controlling because the plaintiff in error was not a party to the suit. It is not a question of *res judicata*, nor of estoppel, but of authority. No new facts which could affect the question one way or the other have been brought to light or suggested, and the law of the case, having once been determined by this court, remains the law.

Aside from the binding force given to it by the implied sanction of this court, the opinion of Judge LOVE is valuable for its masterly exposition of the principles involved. The precise point for decision cannot now be better stated than in the language of that eminent jurist, which here follows:

"Again, the defendant's counsel contend that the rights of the complainant company were immutably fixed by the line which the McGregor Company caused to be located and returned to the proper department of the government in August, 1864; that, by virtue of this line the limits of the grant under which the complainant claims were established; that thereupon the lands in place on that line passed to the trustee from the United States, and the grant ceased to be afloat, and that no power in the government, except Congress, could change that line so as to authorize the complainant company to go beyond its prescribed limits on either side for lands in place or for indemnity lands. If this view can be sustained, it seems to be conceded that no considerable part of the lands in dispute can be awarded to complainant."

What more is needed to show that the right to modify the western end of the line so as to conform to the act of Congress was directly involved in that case? If there was no such right, it was conceded that no considerable part of the lands in dispute could be awarded to complainant. Whether there was or not, was the pivotal point in the case.

Proceeding to a consideration of the point thus clearly and distinctly stated, the learned judge concedes that in ordinary cases of land grants for railroads, the principle

contended for by defendant prevails. When the line is definitely located and assented to by the proper department, the limits of the grant are fixed, and no subsequent change of the line is permitted. But he was of opinion that the grant under consideration was peculiar, and that the rule could not apply to it. The grounds of this conclusion are thus stated:

"Here was a grant in the same act for two railroads, which were to intersect each other in O'Brien county. There was no authority in the law to make the intersection beyond the limits of O'Brien county, and, if the law had been in this regard violated, we can see no ground upon which the McGregor Company or its successors could have claimed the land. Now, until the line of the Sioux City and St. Paul road was located, it was simply impossible to fix definitely the line of the other road through O'Brien county to the point of junction, so as to conform to the requirements of the act of Congress. Hence the line of 1864, within O'Brien county, was necessarily an open and indefinite one until that of the rival company was established—about two years later. If, at any time before the location of the defendant's line in O'Brien county, the line of 1864 had been projected westward, the point of intersection would have been beyond the limits of O'Brien county. We judge, both from the nature of the case and the history of the transaction, that both the Federal and State governments must have regarded the line of 1864 within the limits of O'Brien county as open and indefinite until the line of the other road was located."

The fact that lands had been patented with reference to the portion of the line east of Clay county was held not to affect the power to make the required change at the western end of the line. Such a recognition of the line of 1864 the court did not regard as at all inconsistent with the contemplated change of the line in Clay and O'Brien counties so as to make it conform to the requirements of the act of Congress with reference to the point of intersection.

The proof upon the point that the change was made in obedience to the imperative demand of the department is

presented by the learned judge with great force and clearness. As indicating that in the view of the commissioner the line of 1864 through Clay and O'Brien counties was not the true line, and that the true line could not be located without reference to the point of intersection, he refers to the letter bearing date May 13, 1868 (Rec., 18), in which that officer urges upon the Governor of Iowa the necessity of having the true point of intersection in O'Brien county in accordance with the statute, and requests that at an early day a map, properly authenticated, showing the location of the line through Clay and O'Brien counties to the point of intersection with the Sioux City and St. Paul Railroad, be filed.

The opinion then proceeds to consider the correspondence between the commissioner of the general land office and the officers of the railroad company, reviewing at length the commissioner's letter of October, 1868, (see Rec., 23) to the company's engineer having in charge the duty of relocating the line through Clay and O'Brien counties to the point of junction. This letter calls the attention of that officer to the requirements of the act of 1864 respecting the filing of a map in the department, properly authenticated, showing the location of the line of road through those counties to the point of intersection with the Sioux City and St. Paul Railroad. It encloses to Mr. Shepherd a diagram showing the located line of the McGregor Western road (now the Chicago, Milwaukee and St. Paul) to the eastern boundary of Clay county, and of the proposed line through Clay and O'Brien counties to the point of intersection in the latter county. He refers also to a letter dated November 3, 1868 (see Rec., 19) from the commissioner to the engineer insisting that the work of relocating the line be commenced

immediately in order that the department might determine by sectionized limits the land to be held at double minimum price within ten miles on each side of the located line running through Clay and O'Brien counties to the point of intersection.

All this, the learned judge concludes, was entirely inconsistent with the view that the line was treated by the and government as definitely located through Clay county a part of O'Brien county ever since 1864, and that if the "commissioner's action in the matter did not amount to "a positive order for a relocation of the line from the "eastern boundary of Clay county to the point of junc- "tion, it was such a requirement as could not be ignored "or disregarded by the McGregor Company."

The act of the commissioner is presumed to emenate from the Secretary of the Interior, and to be done by authority of that officer, upon whom the law casts the duty of administering the grant. As an act done within the scope of his authority, by an agent of one of the contracting parties, his acceptance of the new location was conclusive upon the government and all parties concerned.

The claim that Secretary Cox refused to authorize the change af location in question, was also refuted by Judge LOVE, who shows that the proposed relocation to which the secretary refused to give his assent, was from a point forty miles *east* of the *east* line of Clay county, and was wholly unnecessary to satisfy the conditions of the granting act. The change, in fact, made was necessary for that purpose and was not only authorized, but commanded by the department whose every requirement was explicitly obeyed by the company. I quote from the opinion:

"Nor is this action of the commissioner at all inconsistent with his refusal to accede to Mr. Russel Sage's request. Mr. Sage asked permission to relocate the line from a point (Algona) about forty miles east of the east line of Clay county. It is evident that the commissioner considered the line fixed and established from that point to Clay county; and it had, doubtless, been acted upon in the department. The commissioner declared that he had no authority to assent to a relocation of the line from that point, because it had been definitely located, the map thereof filed and the lands withdrawn. But the commissioner might well assume that he had authority, by virtue of the act of Congress requiring the intersection in O'Brien county, to require such a relocation of the line as to make it conform to the terms of the act."

It is submitted that the affirmance by this court of the decree of the Circuit court upon this branch of the case is conclusive. But how does the question stand upon principle?

Ordinarily the terms of the granting act may be complied with by one of several routes. In such cases the adoption of either one of the possible routes, when accepted by the department, defines the limits of the grant. It is not contended that such a location could be changed or varied without the consent of Congress.

But this principle can apply only to a valid location, to one which conforms to the requirements of the granting act. An ineffectual attempt to comply with the act does not relieve the company from the obligation to conform to its requirements. In the present case the Sioux City company was not required to construct its road to an intersection with that of the Chicago company. The latter was required to intersect the former, to make the intersection in O'Brien county, and not elsewhere; to be constructed in a westerly direction and by the most practicable route. How was it possible to meet these requirements two years before the location of the road with which it was to intersect?

The location of 1864 must, in the nature of things, have been preliminary and subject to change, if necessary, to meet the requirements of the act. No line failing to intersect with the Sioux City and St. Paul in O'Brien county could be either fixed or definite. The intention with which it was made or accepted is immaterial. It was not the line contemplated by the act of Congress and the company had no authority to make, or the department to accept it as such. Notwithstanding the abortive attempt to so establish it, the power and obligation to locate and to construct the road to the point of intersection remained.

Any other view would lead to the most absurd consequences. The grant was not intended to enrich the McGregor Western Railway Company. It was to aid in the development of the country through which the road was to pass, and, if that company failed to perform the conditions imposed, the lands were to be resumed and conferred upon some other company that would comply therewith. To hold that the power was exhausted, not by its valid execution, but by a futile attempt to exercise it, would enable the first company, by an illegal, unauthorized location of the route, to make a performance of the conditions of the grant impossible, and thus defeat its whole object.

It is argued that, since the map filed in 1864 purported to be a map, not of a part, but of the whole line from McGregor to its western terminus, the line east of Clay county was no more definetly fixed than was the western portion. It was all, it is said, open and indefinite, or all definitely fixed, and, if the whole line was open, that part of it east of Clay county never has been definitely fixed, and hence the grant never attached. The argument is

more specious than sound. When, in obedience to the directions of the department, the line was made to conform to the requirements of the granting act by a change in the western portion, that portion left unchanged was recognized and adopted by both parties to the grant as a part of the entire line. Then, if not before, it became definitely fixed. The map designating it, duly authenticated and recognized as correct by all parties concerned, being on file in the department, what more could be required?

There is no force in the suggestion that the old line might have been extented to the point of intersection. Whether, having regard to the line as a whole, the way to make the junction by the most practical route was by an abrupt change in the line at its western terminus, and an extension of it to the point of intersection, or to go back to a point whence the line could be extended in the same general direction as the balance of the road, is a question which concerned only the government and the railway company. It was a question of fact, involving in its determination the exercise of large discretionary powers. As such it was committed to the decision of the department to which the execution of the grant was confided, whose decision upon it is final and conclusive upon all tribunals.

*Martin* v. *Mott*, 12 Wheaton, 31.
*R. R. Co.* v. *Stimpson*, 14 Peters, 448.
*R. R. Co.* v. *Attorney General*, 118 U. S., 682.
*Heath* v. *Wallace*, 138 U. S., and cases there cited.

As was said by Judge Love, in the opinion so often quoted:

"At what point on the old line the deflection north-
"ward to accomplish that purpose should commence must,
"of course, have depended upon circumstances. The com-
"missioner might well have considered himself author-
"ized to indicate the point in question. It was impera-
"tively necessary that some one should fix a point of de-
"parture from the old line, and we see no reason why
"the commissioner was not that person."

The original location failing to comply with the act of Congress, the government, through its proper officers, determined what should be done to make it conform to the act. The company yielded implicit obedience to the orders of the department, and complied with every requirement. For nearly twenty years the line thus established has been recognized as the true line, of definite location by all parties concerned; by the state in conferring the grant upon the Milwaukee company, by that company in accepting the grant and constructing the road, and by the department in adjusting the grant and issuing patents. Upon the faith of this assent and acquiescence of all parties to the grant, important rights have been acquired which it would be gross injustice to disturb, even at the suit of the government. Much less can a mere stranger to the grant be permitted to interfere. The parties to the transaction being satisfied, what cause has he for complaint?

B.

**Deflections of line of road as constructed from line of definite location not such as to destroy identity of road built, with that of definite location, or to affect title of company.**

1. The acceptance of the road, as constructed by the interior department, is conclusive upon this point. (See "Brief of Argument," proposition VI, 2, B, 1.)

2. If subject to review here, the correctness of the decision of the honorable secretary admits of no doubt. (See "Brief of Argument," proposition VI, 2, B, 2.)

C.

**If conditions of grant had not been complied with in this, or in any other respect, title would still remain unimpaired in grantee, until forfeiture is asserted by the government.**

(See "Brief of Argument," proposition VI, 2, C.)

D.

***Grantors of defendant in error obtained a good title by decree against Sioux City Company and patent from the state if not by the grant.***

The patent from the government to the state, embracing the particular tract in dispute, is set out in the record on page 27 and 28. Among other things it recites:

"The filing in the department of evidence of the completion of fifty miles of the Sioux City road; also that the tract in question was within the twenty-mile or indemnity limits of that road; that it was part of the land enuring to the state in aid of its construction for the said fifty miles of road; that it had been selected and reported to the department in accordance with the act and the rules and regulations of the general land office."

These recitals embrace every fact essential to the validity of the patent, and, without reference to the recitals, the patent itself affords presumptive evidence of every fact essential to a perfect title, including the fact that the land was subject to the grant and had been duly earned by the company for whose benefit it was issued.

What is there in this record to overcome the presumption, except upon the hypothesis that the land enured to the benefit of the other road aided by the grant? If Hamblin's contention that it did not so enure is correct, what ground is there to impeach the equity of the Sioux City company? In view of the undisputed fact that the land was within the indemnity limits of its road and of the other facts recited in the patent, what interest, legal or equitable, could remain in the government?

The only adverse claim that could possibly exist was that of the rival corporation under which defendant in error derives title, and that only upon the assumption that its amended line was the true line of definite location. Its remedy was not a proceeding to annul the patent, as that would place the title back in the United States, and no one but the government itself could maintain a bill for that purpose, and then only in case the patent was wrongfully issued; in other words, the remedy was by a bill to declare the patentee a trustee for the real owner.

To such a proceeding the only proper parties were those whose interests might be affected by the decree. It has been seen that the government had no interest in the matter, and claimed none. If the land did not fall within the grant to the Chicago company, it was properly patented for the benefit of the other company. The equitable ownership was in one or the other of the two com-

panies. The only rights, therefore, to be determined, were rights arising *under*, not *adverse*, to the grant, and to the determination of these rights the two companies were the only necessary parties.

In this state of the case the grantor of defendant in error, claiming to be the equitable owner of the land, brings its bill in a court of competent jurisdiction against the Sioux City company, and obtains a decree sustaining its claim. It was adjudged that the amended line of its road was the true line of definite location, and the land in question being within the ten-mile limits of such line, passed, under the grant, to that company.

See *R. R. Co.* v. *R. R. Co.*, 10 Fed Rep., 435–450.

Affirmed in this court, 117 U. S. 406

See also the decree entered by the Circuit court on mandate from this court, set out on pages 29 to 34 of record.

To the equities thus established was united the legal title by the patent from the state. It is not open to doubt that, as to the equities, the decree was conclusive between the two companies, and who else, under the evidence, could have any interest in the matter? And when the trustee, in recognition of this adjustment, conveyed the legal estate to the beneficiary, thus ascertained and determined, what more was needed to perfect its title?

If the decree was erroneous, a wrong has been done to the Sioux City company beyond the power of courts to remedy; but its equity, which was perfect against every one except the complainant in that suit, was nevertheless vested by the decree in said complainant, to whom

the legal title was afterwards transferred by the patents from the state.

In other words, if the change in its line was unauthorized and void, the title of the Chicago company is derived from the rival corporation, and takes its inception from the date of the patents issued by the United States to the state for the benefit of that company. On the contrary assumption, that the new line was legal and valid and constituted the true line of definite location, the land passed to the grantor of defendant in error, under the grant which attached to the land upon the filing of the map of the amended route in 1869. In any event its title is invulnerable.

It has been seen that the letter is the correct view, and that the land enured to the grantor of defendant in error under its grant. Though the recitals in the patent to the state show that the land had then been earned by the company designated as beneficiary, it had not been earned by the true beneficiary. The patent was, therefore, prematurely issued, and for that reason the United States may have been entitled at any time before the lands were actually earned by the real beneficiary, to maintain a bill to cancel it.

But the legal title passed out of the government with the issuance of the patent; and when the road as constructed was accepted as and for a compliance with the terms of the grant by the proper executive officers of the general government, acting in its behalf and within the scope of their authority, all equitable rights of the government in and to the lands were at an end. Since then it has had no interest, either at law or in equity, which it could assert in any form of action or in any form.

As was held by Judge Love in *R. R. Co.* v. *R. R. Co.*, 10 Fed. Rep., 442, the action of the department in conveying the lands to the state, though conclusive as to the legal title, was not so in respect to the parties entitled to the beneficial interest. The state took the legal title as trustee for the party really entitled and was bound to dispose of the land, not in compliance with the directions of the secretary of the interior, but in accordance with the provisions of the act of Congress by which the lands were granted. Notwithstanding the designation in the patent to the state of the Sioux City and St. Paul Railway Co. as beneficiary, the title to the lands was held by the state in trust for the grantor of defendant in error. This trust relation was recognized by the legislature in the act conferring the grant upon the Chicago, Milwaukee and St. Paul Railway Co., and when the lands were earned by that company and patented to it by the governor of Iowa in accordance with the conditions contained in that act, its title became absolute and indefeasible.

## Plaintiff in error in no position to question title of the company.

It has been seen, pages 46–52, that the patents ~~of~~ to the state passed the legal title and that with it passed away all control over the lands by the executive officers of the government. An instrument valid and effectual at law, cannot be void in equity. The most that can be claimed is that it may be avoided, or its operation controlled in equity at the suit of the parties in interest.

After the executive officers of the government lose jurisdiction over the land, there is obviously no way by which private interests in it can be initiated, by entry or

otherwise. The interest, therefore, that will entitle a claimant to contest the validity of the patent, or insist that it shall operate otherwise than according to its terms, must be acquired before that time. If no prior right has been acquired by individuals, the government is the only party injured, and hence, the only one entitled to complain. Such is the settled doctrine of this court.

There exists no power in any officer of the government to reconsider the facts on which the patent issued, and to recall or recind it, or to issue another for the same land. The courts of justice are as open to the United States to sue for the cancellation of the deed or conveyance of the land, as to individuals; and if the government is the party injured, this is the proper course.

*Moore* v. *Robbins*, 96 U. S., 530.

If any individual, setting up claim to the land, has been injured, he may have his remedy against the party who has wrongfully obtained the title *which should have gone to him*. A court of equity will correct the error by directing that to be done, which would have been done if no error had intervened. This result is accomplished by treating the patentee as a trustee and compelling him to transfer the legal title to the true owner.

*Lee* v. *Johnson*, 115 U. S., 48.

To entitle him to relief in equity it is not sufficient to show that there may have been mistake or error, either of law or fact, in adjudging the title to the patentee. It must further appear that by law properly administered the title *would* have been awarded to the claimant; that he had some right then existing of which he was deprived by the issuance of the patent to his adversary. It is for

the party whose rights are alleged to have been disregarded that relief is sought, not for the government, which can file its own bill when it desires the cancellation of a patent unadvisedly or wrongfully issued.

*Bohall* v. *Dilla*, 114 U. S., 47.
*Sparks* v. *Pearse*, 15 U. S., 408.
*Lee* v. *Johnson*, *supra*.

It is idle to assert that the Chicago company, prior to its suit with its rival corporation, was in the same position as that now occupied by plaintiff in error. Its title, though acquired by *it* subsequent to the date of the patent to the state, is older than that patent. It claimed *under*, not *adverse* to the state. Its title is derived from the act of Congress of May 12, 1864, and takes its inception from that date, or, at least, from the date of the location of its amended route in 1869; whereas, the patent to the state was issued in 1873.

Plaintiff in error, on the other hand, does not connect himself with any title reaching back of the patent to the state, or with any title, for that matter. He is not the grantee of the state or of the United States, nor does he stand in privity with either as a source of title.

It is not pretended that Hamblin had any interest prior to the date of the patent to the state. He could acquire none thereafter, as, by the patent if not before, the land passed beyond the jurisdiction of the department. It appears, moreover, that his application to enter the land was rejected. The department has attempted to confer no right upon him, and could not if it would. The issuance of the patent to the state was, therefore, no injury to him. Nor is it material to him what the state did with the land. It was wholly a question between the state as

trustees, the railroad companies as beneficiaries and the government. The plaintiff in error is neither harmed nor helped by any disposition made of it. What grievance, then, has he to complain of? What right has *he* in a court of equity to seek redress for an alleged wrong inflicted *upon another*.

Respectfully submitted.

JOHN S. MONK,
*For Defendant in Error.*